Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

PEGGY NELL HART,

Petitioner,

v.

HAROLD B. O'BRIEN, FRANK MONTANA, C.T. "TOMMY" MYRICK, JEFF STARNES, AND CARL MOTLEY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is consideration on the merits of an interlocutory appeal based on qualified immunity an exercise in extra-jurisdictional decision making when the district court denies summary judgment precisely because disputed material facts must be resolved by the factfinder before the individual defendants' entitlement to qualified immunity can be determined?

II. Are prosecutors/legal advisors and police officers entitled to summary judgment based on qualified immunity when there is substantial evidence that they knowingly or recklessly gave false incriminating information and withheld relevant exculpatory information in the procurement of a warrant?

III. Is a tagalong prosecutor/legal advisor who participates in the execution of a warrant that was procured on the basis of inaccurate information provided by the prosecutor/legal advisor shielded by qualified immunity when he stands by and does nothing to stop the arrest even after he knows that the person being arrested is a different person than the person with the same name identified in the warrant?

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PETITION FOR A WRIT OF *CERTIORARI*

Petitioner Peggy Nell Hart, respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 6, 1997 and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc dated July 23, 1998.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported as *Hart v. O'Brien*, 127 F.3d 424 (5th Cir. 1997) and is set out in the Appendix at A-1. The panel's unreported order denying rehearing and rehearing *en banc* was entered on July 23, 1998 and is set out in the Appendix at B-1. The district court's unreported order granting in part and denying in part summary judgment was entered on January 26, 1996 and is set out in the Appendix at C-1.

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

This case involves the Fourth Amendment to the United States Constitution which is set out in its entirety

in the Appendix at D-1. This case also involves the Civil Rights Act of 1871, as amended, 42 U.S.C. § 1983 which is set out in its entirety in the Appendix at E-1.

STATEMENT OF THE CASE

Petitioner Plaintiff Peggy Nell Hart [hereafter Mrs. Hart] was arrested on August 25, 1992 and spent 17 days in jail before the false charges against her were completely dismissed on February 23, 1993 due to insufficient evidence.

The warrant which resulted in Mrs. Hart's arrest and 17 day incarceration contained false information. Specifically, the warrant incorporates an "Affidavit", sworn to by Respondent Defendant Texas Department of Public Safety Officer O'Brien [hereafter Officer O'Brien], which discusses Mrs. Hart only as follows:

> . . . an unknown, white female with light brown hair who is residing at the mobile home, has stopped by the white frame house with black trim and shutters, entered the residence and returned a short time later. The unknown, white female has been seen by Affiant driving a blue Buick, registered to a Peggy Hart. Peggy Hart is married to Stanley Hart, who according to DTF files, is a known marijuana cultivator in Red River County, Texas.

The only significant information about Mrs. Hart in the affidavit is that she resided at the mobile home inhabited by David Conine and that she is married to Stanley Hart, a known marijuana cultivator. Both statements are completely false.

Respondent Defendant Prosecutor/Legal Advisor Starnes [hereafter Legal Advisor Starnes] is the person who provided Officer O'Brien with the false information in the affidavit that Mrs. Hart is married to Stanley Hart, a known drug cultivator. Legal Advisor Starnes provided the above completely false incriminating information against Mrs. Hart despite the fact that he had at least constructive knowledge that Mrs. Hart was not "Peggy Hart." Specifically, (1) he first met the Peggy Hart who is married to Stanley Hart in May 1992; (2) he knew that the Peggy Hart married to Stanley Hart worked for Judge Nutt in the Courthouse; (3) the Peggy Hart married to Stanley Hart told him that Stanley Hart was working for a counselling group in Oklahoma prior to the time of the raid; (4) he knew that the Peggy Hart married to Stanley Hart lived near the Manchester community; and (5) he knew that the Young's Chapel community where Mrs. Hart was arrested was a different community than the Manchester community where the Peggy Hart married to Stanley Hart resided.

Legal Advisor Starnes tagged along during the raid and admits that he knew immediately when he saw Mrs. Hart that she was not the Peggy Hart married to Stanley Hart. Legal Advisor Starnes also knew that the affidavits contained false information and that the warrant had been issued, in part, based upon the false information. Nevertheless, he allowed the search and arrest to continue and instead of stopping the arrest, he told Respondent Defendant Deputy Sheriff Motley [hereafter Deputy Motley] to take Mrs. Hart to jail.

It is undisputed that a bogus "federal hold" was placed on Mrs. Hart which prevented her from bonding

out of jail for one day. It is also undisputed that Deputy Motley physically wrote "federal hold" on the complaint. There is testimony that Officer O'Brien originally told Deputy Motley to place the "federal hold" on Mrs. Hart, but there is also testimony that it was first discussed by Officer O'Brien, Officer Montana, Legal Advisor Starnes and Deputy Myrick.

Both the charge filed by Deputy Motley and the court's "Criminal Docket" indicate that Mrs. Hart was not allowed to post bail due to the "federal hold."

Deputy Motley is the person who took Mrs. Hart to jail and physically wrote "federal hold" on the complaint. Deputy Myrick is the officer who actually arrested Mrs. Hart.

PROCEEDINGS BELOW

The district court granted in part and denied in part the defendants' motions for summary judgment based on qualified immunity.[1] [App. C-1]. In denying qualified immunity for Officer O'Brien, Officer Montana, Legal Advisor Starnes and Deputy Motley on Mrs. Hart's

[1] The district court granted the motions for summary judgment with respect to the municipal liability claims against Defendant Red River County, Texas; Defendant C.T. Myrick was granted qualified immunity on Plaintiff Hart's Section 1983 claim; and the claim against Defendant C.T. Myrick for intentional infliction of emotional distress was dismissed. All other requests in the motions for summary judgment were denied.

claims for unlawful search and arrest, the court specifically found that questions regarding their intent, *i.e.*, whether the inaccurate information in the warrant was intentionally or recklessly submitted, were sufficient to preclude summary judgment. The court went on to state:

> Whether the actions of O'Brien, Montana, Starnes, and Motley were objectively reasonable "cannot be sorted out without settling on a coherent view of what happened in the first place."

[App. C-18].

A divided panel of the Fifth Circuit reversed and rendered. *Hart*, 127 F.3d 424, 454 (5th Cir. 1997) and Appendix A-1.[2] Judge Benavides dissented because in his view the Fifth Circuit lacked jurisdiction to hear the interlocutory appeal in light of *Johnson v. Jones*, 515 U.S. 304 (1995) and *Behrens v. Pelletier*, 516 U.S. 299, 116 S.Ct. 834 (1996). Specifically, Judge Benavides concluded that the majority granted Officer O'Brien, Officer Montana and Legal Advisor Starnes qualified immunity based on its own initial and extra-jurisdictional finding that Officer O'Brien and Legal Advisor Starnes did not knowingly or recklessly include false statements in the probable cause affidavits, despite the district court's explicit finding of

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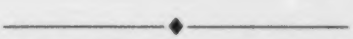
[2] Specifically, the panel opinion reversed the district court's holdings on qualified and official immunity with regard to Defendants O'Brien and Montana, rendering summary judgment in their favor on all counts. The opinion further reversed the district court's holding on qualified immunity with regard to Defendants Starnes and Motley and rendered summary judgment in their favor on Plaintiff Hart's federal claims.

fact to the contrary. 127 F.3d at 454 (Benavides, J. dissenting). Judge Benavides then found that the majority's own extra-jurisdictional conclusions allowed them to find qualified immunity, resulting in the dismissal of Mrs. Hart's claims. Judge Benavides concluded:

> [B]y including these statements within the probable cause affidavit, the majority transforms a warrant of questionable validity into a "facially valid" warrant, that can be relied on by the very people who may have intentionally or recklessly provided the issuing magistrate with false information. . . . Thus, solely by virtue of its improper exercise of jurisdiction, the majority is able to immunize O'Brien, Montana, and Starnes with respect to each of Hart's claims before us on appeal.

127 F.3d at 456 (Benavides, J. dissenting) [internal citations omitted].

Mrs. Hart's petition for rehearing and suggestion for rehearing *en banc* were denied on July 23, 1998. (App. B-1).



REASONS FOR GRANTING THE WRIT

JURISDICTIONAL QUESTION

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT'S DETAILED REVIEW ON THE MERITS OF EVIDENCE SUFFICIENCY IN THIS INTERLOCUTORY APPEAL AMOUNTS TO EXTRA-JURISDICTIONAL APPELLATE REVIEW AND SQUARELY CONFLICTS WITH THE HOLDING OF THIS COURT THAT APPELLATE COURTS LACK JURISDICTION IN INTERLOCUTORY APPEALS TO REVIEW A DISTRICT COURT'S DETERMINATION CONCERNING EVIDENCE SUFFICIENCY.

The Panel acknowledged the existence of a relevant Supreme Court precedent, but engaged in extra-jurisdictional decision-making in clear conflict with same.

Ordinarily, an appellate court has power only to review a "final decision." 28 U.S.C. § 1291. A "collateral order" doctrine developed, however, to allow courts of appeals to consider interlocutory appeals in certain circumstances. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). To come within the small class of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978). This Court held in *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985) that "a district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable final decision."

In *Johnson v. Jones*, 515 U.S. 304 (1995), this Court clarified the phrase "to the extent that it turns on an issue of law." Specifically, the Court held that "a defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a 'genuine' issue of fact for trial." 515 U.S. at 314.

This Court explicitly distinguished between orders that resolve legal wrangles and those that determine "evidence sufficiency" disputes in holding that the latter are not appealable. *Id.*

In *Behrens v. Pelletier*, 516 U.S. 209, 116 S.Ct. 834 (1996), this Court clarified that *every* denial of summary judgment ultimately rests upon a determination that there are controverted issues of material fact, and *Johnson* does not mean that *every* denial of summary judgment is nonappealable. 516 U.S. at ___, 116 S.Ct. at 842. However, "if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly 'separable' from the plaintiff's claim, and hence there is no 'final decision' . . . " *Id.* While Defendants strictly avoid this terminology, that is exactly the issue which they present here.

This case revolves around false statements in an affidavit and the arrest of Mrs. Hart without probable cause. Issues regarding the facts possessed by the defendants at the time of the search and arrest are hotly disputed. These disputes are material by any definition. Simply put, the Fifth Circuit did not have jurisdiction to hear the

present appeal under *Johnson, supra,* because the denial of summary judgment on the basis of qualified immunity was based on material factual disputes.

In its January 26, 1996 order, the district court explicitly recognized that genuine disputes concerning material facts precluded summary judgment based on qualified immunity:

> With regard to O'Brien, Montana, Starnes, and Motley, however, the record as it now stands reveals many disputed issues of material fact relevant to their qualified-immunity claims. Until the question of the warrant's validity is resolved – and specifically the question of whether the inaccurate information supporting the warrant was intentionally or recklessly submitted – it is not possible to determine this issue on summary judgment.

[App. C-17]. The district court went on to note the following facts which it found to be in dispute: (1) whether Officer O'Brien and Legal Advisor Starnes provided false information to obtain a warrant for Mrs. Hart's arrest and the search of her home; (2) whether Officer Montana ordered the arrest of Mrs. Hart knowing that probable cause did not exist; and (3) whether Deputy Motley participated in Mrs. Hart's arrest and signed a criminal complaint against her knowing her to be innocent. [App. C-17 & 18].

There is evidence that the officers knew that Mrs. Hart lived in the black and white house, and not with Conine. Even if they thought she lived at the trailer, they intentionally left out the information that she had another house where she spent at least ten out of the last 14 days.

The Fifth Circuit was reviewing the trial court's determination of factual issues, not reviewing a legal issue, and there were genuine disputes about several facts critical to the validity of the warrant, including whether the officials knew it was based on false statements. The other Peggy Hart worked in the same courthouse that Legal Advisor Starnes worked in. Legal Advisor Starnes knew her. Legal Advisor Starnes could say that he didn't realize it was a different Hart but a fact finder could believe otherwise, given the fact that he worked with her, knew what she looked like, and knew that her husband was not a drug dealer but a reformed drug counselor. The jury could also consider the fact that he chose to omit relevant exculpatory information from the warrant, and instead chose to include incriminating facts about Stanley Hart that he knew were no longer true.

As recognized by Judge Benavides in his dissenting opinion, the majority's analysis of the immunity claims for Officer O'Brien, Officer Montana, and Legal Advisor Starnes is entirely predicated on its initial and extra-jurisdictional finding that Officer O'Brien and Legal Advisor Starnes did not violate Mrs. Hart's Fourth Amendment rights by knowingly or recklessly including false statements in the probable cause affidavit. Benavides J, dissenting at 584. The opinion wholly ignores the district court's finding that "the plaintiff has raised a genuine issue of material fact as to whether the false statements that Hart was married to a known marijuana cultivator and lived with Mr. Conine were made knowingly or with reckless disregard for their truth."

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT OPINION WILL OPEN UP THE FLOODGATES OF LITIGATION MAKING VIRTUALLY EVERY DENIAL OF SUMMARY JUDGMENT IN QUALIFIED IMMUNITY CASES IMMEDIATELY APPEALABLE.

The Fifth Circuit determined that it had jurisdiction to review the district court's finding of a genuine issue of material fact because some of the evidence related to that finding is undisputed. 127 F.3d at 436. While examining the uncontested evidence, the Fifth Circuit gives little credence to Mrs. Hart's evidence which was relied on by the district court. The majority cites no authority for its new mode of analysis, and Judge Benavides notes in his dissent that the majority appears to create a new principle of interlocutory jurisdiction. 127 F.3d at 455 (Benavides, J. dissenting).

This novel approach is in direct conflict with this Court's teaching in *Johnson*. To allow interlocutory appellate review over a district court's determination that there are genuine issues of material fact in every case where there are *any* undisputed facts would mean that virtually every denial of summary judgment is appealable.

As this Court pointed out in *Johnson*:

> An interlocutory appeal can make it more difficult for trial judges to do their basic job – supervising trial proceedings. It can threaten those proceedings with delay, adding costs and diminishing coherence. It also risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had

> the trial simply proceeded, would have turned out to be unnecessary.

115 S.Ct. at 2154. By making the determination regarding genuine issues of fact appealable whenever there is any undisputed fact, the Fifth Circuit has opened up nearly all cases to the evils set out in *Johnson*.

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE LOWER COURTS ARE IN HOPELESS DISARRAY IN APPLYING *JOHNSON* AND *BEHRENS*.

The Courts of Appeal are in complete disarray in applying *Johnson* and *Behrens*, and there is no consistency either within circuits or between the circuits in the application of these cases. Most notable in demonstrating the lack of consensus is the Fifth Circuit's 8 to 8 vote in determining whether to rehear *en banc* the case of *Colston v. Barnhart*, 146 F.3d 282, 286 (5th Cir. 1998) (on application for rehearing *en banc*). In *Colston*, Judge DeMoss expressly hoped that his dissent would "attract the Supreme Court's attention to the increasingly complex panorama of doctrine and dissent that have evolved as the courts of appeals have struggled to reconcile the holdings of *Johnson* and *Behrens*." 146 F.3d at 286 (DeMoss, J. dissenting).

The Fourth Circuit split to a similar 7 to 5 vote in *Elliott v. Leavitt*, 105 F.3d 174 (4th Cir. 1997). Judge Motz stated in her dissent:

> All of the rhetoric in the concurrence cannot obscure the panel's decision to replace the district court's finding that the evidence could support a finding that particular conduct occurred with the conclusion of the panel and concurrence that every shred of relevant evidence supports the opposite conclusion. Even if the panel and concurrence were right on the facts [which they are not], they cannot replace the district court's determination of evidentiary sufficiency with their own under *Behrens* and *Johnson*.

105 F.3d at 179 (Motz, J., dissenting).

The lack of consistency is apparent throughout the circuits. There appears to be little rhyme or reason to the conflicting determinations of whether to exercise appellate jurisdiction over interlocutory appeals based on qualified immunity. In many cases, including the above two hotly disputed cases, the appellate court has exercised jurisdiction. *See also Lee v. Sandberg*, 136 F.3d 94, 100 (2nd Cir. 1997) (finding jurisdiction despite trial court's conclusion that a jury could find that the state trooper's actions in arresting Mr. Lee were objectively unreasonable); *Turner v. Scott*, 119 F.3d 425, 428 (6th Cir. 1997) (although district court found that genuine issues of material fact precluded summary judgment, jurisdiction exercised where court accepted plaintiff's version of events as true); *Tangwall v. Stuckey*, 135 F.3d 516 (7th Cir. 1998) (finding that disputed issues of fact were immaterial); *Mencer v. Hammonds*, 134 F.3d 1066, 1070 (11th Cir. 1998) (appellate court had jurisdiction to review the district court's preliminary determination that substantial evidence supported finding of actor's intent when actor's intent was an element of clearly established law); *Cottrell*

v. Caldwell, 85 F.3d 1480, 1486 (11th Cir. 1996) (*Johnson* did not affect the appellate court's authority to decide evidentiary sufficiency issues that were part and parcel of the core qualified immunity issues).

In other cases appellate courts have found that they lacked jurisdiction. *See Carter v. Rhode Island*, 68 F.3d 9, 12 (1st Cir. 1995) (issue of whether supervisor had discriminatory intent was fact question, precluding summary judgment); *Tang v. State of R.I. Dept. of Elderly Affairs*, 120 F.3d 325, 326 (1st Cir. 1997) (events alleged and inferences as to defendants' intent were the very type of factual disputes that *Johnson* held to be premature so far as appellate review is concerned); *Marshall v. Sullivan*, 105 F.3d 47, 54 (2nd Cir. 1996) (question as to what was told to officer, affecting what knowledge the officer possessed, constituted factual question precluding immediate appellate review); *Naylor v. State of La. Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997) (order not suited for immediate interlocutory appeal where qualified immunity was denied because of insufficiently developed record); *McLoud v. Testa*, 97 F.3d 1536 (6th Cir. 1996) (factual questions relating to the actor's intent precluded immediate appellate jurisdiction); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996) (evidentiary dispute of whether it was objectively reasonable for police officer to shove suspect into car barred immediate appeal); *Woolfolk v. Smith*, 81 F.3d 741 (8th Cir. 1996) (appellate court did not have jurisdiction in a deadly force case similar to the case at bar where the trial court found genuine issues of fact regarding, *inter alia*, whether Woolfolk was harming officer or was a threat to harm others and whether officer acted reasonably); *Chateaubriand v. Gaspard*, 97 F.3d 1218,

1223 (9th Cir. 1996) (appellate court did not have jurisdiction to review factual issue of whether defendants had knowledge of complaints); *Shinault v. Cleveland County Bd. of County Com'rs*, 82 F.3d 367, 371 (10th Cir.) (appellate court did not have jurisdiction to review district court's factual finding that employee was fired for engaging in constitutionally protected political activities), *cert. denied*, ___ U.S. ___, 117 S.Ct. 740 (1996).

Finally, in some cases, the appellate court has exercised jurisdiction over only certain portions of the interlocutory appeal. *See Collins v. Jordan*, 119 F.3d 1363 (9th Cir. 1996) (appellate court had jurisdiction to consider defendants' assertion that dispute of fact was not material; however, most claims not addressed due to factual disputes); *Winfield v. Bass*, 106 F.3d 525, 530 (4th Cir. 1997) (*en banc*) (court possessed no jurisdiction over claim that plaintiff had not presented enough evidence to prove that the plaintiff's version of events actually occurred, but did possess jurisdiction over claim that there was no violation of clearly established law).

In short, decisions on appellate jurisdiction over interlocutory appeals based upon qualified immunity reflect no consistency or reliable pattern. For example, the Fourth and Fifth Circuits appear internally divided nearly equally as is reflected by the 7-5 vote in *Elliott, supra*, and 8-8 vote in *Colston, supra*. Other conflicts exist between and within the circuits as set out more fully above. Further guidance is necessary from this Court in order to avoid the quagmire which is emerging in appellate jurisdiction under the present *Johnson* and *Behrens* framework.

QUALIFIED IMMUNITY QUESTIONS

I. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE OF THE IMPORTANCE OF STRIKING A PROPER BALANCE BETWEEN A CITIZEN'S RIGHT TO ENFORCE RIGHTS GUARANTEED HIM BY THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE PROTECTION PROVIDED TO GOVERNMENTAL OFFICIALS BY JUDGE-MADE QUALIFIED IMMUNITY.

Striking a proper balance between an innocent citizen's right to not be subjected to an unlawful arrest and the protection provided to police by judge-made qualified immunity is important. The Fourth Amendment protects citizens from unlawful arrest. On the other hand, judge-made qualified immunity was created because of the recognition that governmental officials, including policemen, need to be able to do their job without fear of constant second-guessing and litigation. *Anderson v. Creighton*, 483 U.S. 635 (1987).

The Fifth Circuit opinion allows the protection afforded governmental officials to swallow protections provided to citizens by the Fourth Amendment, including the long accepted principle that a facially valid search warrant is void when it is obtained on the basis of an affiant's false statement that is knowingly and intentionally made or made with reckless disregard of the truth. *Franks v. Delaware*, 438 U.S. 154 (1978).

The Fifth Circuit is not the first lower court to attempt to expand qualified immunity at the expense of ordinary citizens. In *Crawford-El v. Britton*, ___ U.S. ___, 118 S.Ct. 1584, 1594-95 (1998), this Court squarely rejected

the District of Columbia Circuit's effort to expand qualified immunity by increasing the victim's burden of proof for constitutional claims requiring improper intent. The Court reiterated that the showing of improper intent was a "pure issue of fact." *Id.* at 1591. The Court went on to state:

> In the past we have consistently declined similar invitations to revise established rules that are separate from the qualified immunity defense. We refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defendant, or requiring pleadings of heightened specificity in cases alleging municipal liability. We also declined to craft an exception to settled rules of interlocutory appellate jurisdiction and rejected the argument that the policies behind the immunity defense justify interlocutory appeals on questions of evidence sufficiency. Our reasons for those unanimous rulings apply with equal force to the imposition of a clear and convincing burden of proof in cases alleging unconstitutional motive.

Id. at 1595 (internal citations omitted).

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT'S HOLDING THAT PROSECUTORS/LEGAL ADVISORS AND POLICE OFFICERS WHO KNOWINGLY OR RECKLESSLY GIVE FALSE INCRIMINATING INFORMATION AND WITHHOLD RELATED EXCULPATORY INFORMATION IN THE PROCUREMENT OF A WARRANT ARE SHIELDED BY QUALIFIED IMMUNITY CONFLICTS WITH HOLDINGS OF THIS COURT.

The legality of a warrant is determined in light of the information available to police officers at the time they obtain it. *Maryland v. Garrison*, 480 U.S. 79, 85-86 (1987); *Richardson v. Oldham*, 12 F.3d 1373, 1381 (5th Cir. 1994).

It is well-established that a facially valid warrant may be invalid. *Franks v. Delaware*, 438 U.S. 154 (1978). Specifically, in *Franks* this Court held in relevant part that a facially valid warrant is void when it is obtained on the basis of an affiant's false statement that is knowingly and intentionally made, or made with reckless disregard of the truth and if the false statement is necessary to the finding of probable case. *Id.* at 155-56. Further, an officer who submits a supporting affidavit to a judge that issues a warrant is liable "unless the officer has an objectively reasonable basis for believing that the facts alleged in his affidavit are sufficient to establish probable cause." *Malley v. Briggs*, 475 U.S. 335, 339 (1986).[3]

It was clearly established that Legal Advisor Starnes violated Mrs. Hart's Fourth and Fourteenth Amendment

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[3] *Malley* involved an arrest warrant; however, the reasoning is applicable to both arrest and search warrant cases.

rights if he made false incriminating statements material to the finding of probable cause. *Bruning v. Pixler*, 949 F.2d 352 (10th Cir. 1991), citing *Franks*, 438 U.S. at 155-56. There is substantial evidence that this is exactly what he did.

A warrant obtained based on deliberate misrepresentation of relevant facts designed to mislead the impartial magistrate cannot shield anyone from liability who participated in obtaining the tainted warrant or anyone who becomes aware of the falsity of the warrant before acting on it. The purpose behind arrest warrants becomes a mockery. If officers and prosecutors can escape liability by obtaining a "facially valid" warrant, that leaves out relevant facts known to them that refute the statements in the warrant and/or by intentionally or recklessly including false facts in the warrant. Officers are not required to tell the magistrate every single fact known to them. However, they are required to tell the magistrate facts which contradict the selective "facts" that they choose to give him. Otherwise, an officer can obtain a warrant for a person they know could not possibly be guilty.

It is undisputed that Mrs. Hart was never married to Stanley Hart. It is also undisputed that Stanley Hart was no longer a drug cultivator, but in fact was a drug counselor. Finally, it is virtually undisputed that Mrs. Hart lived in the house with black trim, and not with Mr. Conine.

It is theoretically possible that Legal Advisor Starnes really believed that Mrs. Hart was married to Stanley Hart when he provided the false information. However,

there is substantial evidence that his false statement was knowingly or recklessly made. Specifically, it is uncontroverted that Legal Advisor Starnes was acquainted with the Peggy Hart that was married to Stanley Hart when he provided the information that led to the procurement of the arrest warrant for Mrs. Hart. It is also undisputed that he knew that Stanley Hart no longer was a drug cultivator but was a drug counselor. Finally, Mrs. Hart lives in both a separate community and a separate county from the Peggy Hart that Legal Advisor Starnes was acquainted with.

Simply put, there is substantial evidence that Legal Advisor Starnes lied and misled the magistrate so he could arrest Mrs. Hart. All of the facts that Legal Advisor Starnes knew which he did not provide in procuring the warrant are illustrative. For example, he knew that Stanley Hart is not now a drug grower, but a drug counselor. There is substantial evidence that he knew that Mrs. Hart is not the Peggy Hart married to Stanley Hart. The only reason for putting this misleading information in the affidavit was to imply that Mrs. Hart had a connection with a drug dealer. Stated differently, Legal Advisor Starnes wanted to mislead the magistrate into believing the woman they wanted to arrest was married to a drug dealer.

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FIFTH CIRCUIT'S PROVIDING A PROSECUTOR/LEGAL ADVISOR WITH QUALIFIED IMMUNITY WHO STANDS BY AND DOES NOTHING TO STOP THE ARREST OF AN INNOCENT CITIZEN EVEN AFTER HE KNOWS THAT THE CITIZEN BEING ARRESTED IS A DIFFERENT PERSON THAN THE PERSON NAMED IN THE WARRANT CONFLICTS WITH HOLDINGS OF THIS COURT.

This Court recognized in *Maryland v. Garrison*, 480 U.S. 79 (1987) that police must stop their search, even if they have a warrant for and probable cause to believe that drugs are being sold out of a particular floor, once they learn there are two apartments on the floor and they are unable to tell which of the two apartments is involved. *Id.* U.S. at 83 n. 13. The reasoning in *Maryland* is equally applicable to the case at bar and Legal Advisor Starnes had a duty to stop the arrest after he knew that the Peggy Hart being arrested was not the person he had identified in procuring the warrant.

The majority correctly recognized that a plaintiff states a § 1983 claim against a police officer who, after learning of "patently exculpatory evidence", deliberately fails to disclose it to the prosecutor. *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir. 1992). *Hart*, 127 F.3d at 446. However, the majority went on to state "There is no exculpatory evidence in the instant case." *Id.* at 447. The truth is that nothing could be more exculpatory than actual knowledge that the person you have identified to procure the warrant is a different person than the person actually seen during the raid.

A warrant cannot be facially valid to people who know that it is in fact based on false statements. The reason an officer can rely on a facially valid warrant is because he cannot always be expected to know the true facts. This purpose certainly is not furthered by allowing officers to ignore and omit facts which show that the allegations in the warrant are false and that the person is innocent.

To allow Legal Advisor Starnes to escape liability because the warrant appeared to be facially valid when he knew it omitted relevant facts and he knew that Mrs. Hart was not a person connected with a drug dealer is to mechanically manipulate words and totally ignore the reasons and purposes connected with the laws and case law related to warrants and immunities. Stated differently, Legal Advisor Starnes did not "rely" on a valid warrant. He used it as an excuse. Simply put, it is laughable to assert that a reasonable officer can rely on a warrant that he knows contains material incriminating false information.

CONCLUSION

For the reasons stated above, Petitioner Peggy Nell Hart respectfully requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fifth Circuit.

October 20, 1998

Respectfully submitted,

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APPENDIX A

PANEL OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NOVEMBER 6, 1997

United States Court of Appeals,

Fifth Circuit.

No. 96-40151.

Peggy Nell HART, Plaintiff-Appellee,

v.

Harold B. O'BRIEN, DPS Officer, et al., Defendants,

Harold B. O'Brien, DPS Officer; Frank Montana, DPS Officer; C.T. Myrick, Law Enforcement Officer; Carl Motley; Jeff Starnes, Assistant Lamar County Attorney, Defendants-Appellants.

Nov. 6, 1997.

Appeals from the United States District Court for the Eastern District of Texas.

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Various state and county officials searched the home of Peggy Nell Hart ("Hart"), arrested her, and charged her with possession of marijuana. She remained in jail more than two weeks. After the state dismissed the charges, Hart filed suit pursuant to 42 U.S.C. § 1983 and state law against Red River County, Texas ("the county") and a number of the officials involved in the case. These officials include Jeff Starnes, an assistant county attorney in Lamar County; Harold O'Brien and Frank Montana, both Texas Department of Public Safety ("DPS") narcotics officers; and Carl Motley and Tommy Myrick, who were at the time Red River County sheriff's deputies (collectively, "the officials"). The county and the officials then

moved for summary judgment, with the county arguing that it could not be vicariously liable for the actions of its officials and the officials variously asserting absolute, qualified, and official immunity. The district court granted the county summary judgment and Myrick summary judgment in part, but denied the rest of the motions. The officials mount an interlocutory appeal of the portion of the district court's judgment dealing with immunity. Finding error as a matter of law, we reverse the district court's judgment on qualified immunity and official immunity; we render judgment in favor of all the officials on the federal claims and in favor of O'Brien and Montana on the state law claims.

I

In reviewing a district court's denial of a motion for summary judgment on the grounds of immunity, we must view the facts in the light most favorable to the nonmovant. *Blackwell v. Barton*, 34 F.3d 298, 301 (5th Cir.1994).[1]

Hart and David Conine lived near each other in a rural area of Red River County. Conine resided in a trailer and Hart in a white house with black trim and shutters; their homes were separated by a pasture and partly surrounded by dense woods. However, the summary judgment evidence also reveals that Hart, at times, spent the night at Conine's trailer.

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[1] Our recitation of facts accepts Hart's evidence and reasonable inferences from it as true and should not be construed as expressing any view as to the weight or credibility of her evidence. *Salas v. Carpenter*, 980 F.2d 299, 304 n. 3 (5th Cir.1992).

On August 11, 1992, the state and county conducted an aerial survey of the property surrounding the trailer and the white house with black trim, and they discovered several marijuana patches. O'Brien was assigned to investigate. O'Brien believed that the marijuana was growing on land owned or controlled by Conine, and determined that Conine had been arrested in 1985 for growing marijuana and operating a methamphetamine laboratory on the same property. O'Brien, along with Montana and nine police officers, conducted surveillance on the Conine residence and the surrounding property for about two weeks. O'Brien and Montana jointly supervised the operation. The agents ultimately determined that six marijuana patches existed: three were in a tree line across a pasture from Hart's home (one being directly across the pasture from the home), one was near a trash dump southwest of the Hart residence, one was northeast of the trash dump, and one was amidst some trees directly behind the Hart home.

The officers saw Hart engage in certain activities (or saw signs of such activities) that led them to believe she was residing in Conine's trailer. Hart does not contest that the officers made the following observations:

> On August 12, Hart stayed overnight at Conine's residence.
>
> On August 13, Hart and Conine left the property. Upon Hart and Conine's return the next day, the officers observed them unloading clothes from Conine's vehicle and taking them into the trailer.
>
> Hart spent that night in the trailer.

> Hart stayed at least two other nights in the trailer during the two-week surveillance period.
>
> Hart went out to eat occasionally with Conine.
>
> Hart would feed the animals in and around Conine's barn.
>
> The officers observed Jerry Benton, a known marijuana grower, visit the Conine residence. Hart was at the residence during at least some of Benton's visit.
>
> Conine and Hart drove in the direction of the trash dump, which is located near one of the marijuana patches. Hart exited the truck to open the gate to the dump and stayed there until Conine finished dumping some trash.[2]

Around August 24, O'Brien and Starnes drafted a search and arrest warrant and two supporting affidavits, both signed by O'Brien. The affidavits contained information on the activities the officers saw. The warrant, as signed by the state district judge, commands the appropriate law enforcement officers "to enter the suspected place and premises described in [the attached] Affidavit

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[2] The officers also assert in affidavits and deposition testimony that they observed Hart and Conine embrace, Conine urinate in front of Hart, Hart make breakfast for Conine and Benton, Hart come out on the porch of the trailer in the morning wearing a robe, and Conine make "heat runs" (i.e., drive his car in a certain way to determine if he was being followed) with Hart in the car. Hart disputes these alleged observations. Because we are to view the facts in the light most favorable to Hart, *Blackwell*, 34 F.3d at 301, we will not consider disputed facts in determining whether the officers had, or reasonably believed that they had, probable cause to search Hart's home or to arrest her.

and to there search for the property described in said Affidavit and bring it before me and persons described in said Affidavit and arrest them and bring them before me." In the first affidavit, the "property to be searched" included Conine's trailer and barn, a vacant white-frame house, "a single-family, white frame residence with black trim and shutters," various outbuildings, and a number of cars (hereinafter "the property"). Hart lived in the white house with black trim and shutters, although the affidavit did not say so. The affidavit did refer to two of the cars "on the property" as being registered to Hart. The affidavit also noted that the property was controlled by Conine and "[a]n unknown white female, approx. 5'6" tall with brown hair and medium build." The affidavit "charges and accuses" Conine and the unknown white female of possessing marijuana.

The second affidavit contained the facts allegedly supporting probable cause. This affidavit repeats the information about the white house with black trim and shutters and the two cars registered to Hart. The only other reference to Hart is the following:

> During the almost continuous surveillance on Conine's property, affiant observed Conine enter and leave the property on numerous occasions. On several of those occasions, Conine and/or an unknown, white female with light brown hair who is residing at the mobile home, has stopped by the white frame house with black trim and shutters, entered the residence and returned a short time later. The unknown, white female has been seen by Affiant driving a blue Buick, registered to a Peggy Hart. Peggy Hart is married to Stanley Hart, who according

> to [Drug Task Force ("DTF")] files, is a known marihuana cultivator in Red River County, Texas.

This paragraph contains at least two pieces of inaccurate information. First, Hart did not reside at the mobile home, though she did stay over on several occasions. Rather, she lived in the adjacent white frame house with black trim. Second, Hart was not married to Stanley Hart. Instead, a *different* Peggy Hart was married to Stanley Hart. The officers claim that the first piece of information came from their surveillance of the property. Starnes admits that he helped prepare the affidavit[3] and that he gave the second piece of information to O'Brien for inclusion in the affidavit.

O'Brien swore and subscribed to the affidavit. Based on this affidavit, a state district judge signed the search and arrest warrant on August 24. The next day, a team of law enforcement officers (Motley and Myrick among them), led by O'Brien and Montana, converged on the property to execute the search and arrest warrant. Starnes accompanied them. Starnes concedes that, after he saw Hart, he realized that she was not the Peggy Hart married to Stanley Hart, and that the affidavit was partially based on erroneous information. However, he did not attempt to halt the execution of the warrant.

There was some debate about whether Hart, after being arrested, should be left behind to care for Conine's animals. Nonetheless, O'Brien and Montana executed the

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[3] For simplicity, we will refer to the two affidavits as "the affidavit."

warrant; they instructed Myrick to arrest Hart and Motley to take her to jail. The officers also arrested Conine and took him to jail. During the search of the property, the officers seized a number of items, including 1,132 live marijuana plants.[4] While executing the search warrant, the officers found drugs and drug paraphernalia in Conine's trailer, including two baggies of marijuana, two bongs, the butt of a marijuana cigarette in an ashtray, firearms, ammunition, and $19,000 in cash. In addition, officers found cocaine in Conine's barn and a bag of marijuana seeds inside a shed adjacent to his property. The only objects seized that have been identified specifically as Hart's were some personal papers found in a storage shed on Conine's property. Conine subsequently pled guilty to a drug charge and is now incarcerated. *See generally United States v. Conine*, 33 F.3d 467 (5th Cir.1994).

After Motley took Hart to jail, he filed a criminal complaint against her, charging her with possession of marijuana with intent to deliver and writing the words "federal hold" on the document. According to Motley's deposition testimony, Starnes, O'Brien, Montana, and Myrick had previously discussed putting Hart on federal hold, and Motley did so, pursuant to O'Brien's instructions. Hart was given a hearing before a state magistrate judge on the charge in the complaint. At the hearing, the magistrate was supposed to determine, among other

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[4] Several weeks after Conine's and Hart's arrest, a survey of the land revealed that the marijuana plants had not been growing on land owned by Conine (or Hart). Apparently, "Conine was taking advantage of the isolated nature of the area to grow marihuana on neighboring tracts of land." *United States v. Conine*, 33 F.3d 467, 468 (5th Cir.1994).

things, whether probable cause existed for further detention and the amount of bail. The magistrate denied bail. On the charge sheet from the hearing (which is signed by the magistrate), the phrase "*Bail is denied" is circled and next to it someone has written "Federal Hold."

However, no federal official had lodged a federal detainer against Hart. Motley testified in his deposition that he thought the "federal hold" was intended to detain Hart long enough to allow federal Drug Enforcement Agency ("DEA") officers to speak to her. Apparently, the officers wanted to give federal authorities the opportunity to intervene in the case before Hart could post bail.

The next day, O'Brien filed a superseding complaint against Hart, charging her with possession of marijuana in an amount between five and fifty pounds. The magistrate judge conducted a hearing on the new charge, this time setting bail at $50,000. On September 11, seventeen days after Hart's arrest, someone posted bail for her and she was released on bond. Prosecutors subsequently dismissed the charges against Hart because of insufficient evidence.

Hart then sued Starnes, O'Brien, Montana, Motley, Myrick, and Red River County under 42 U.S.C. § 1983, asserting that her arrest and subsequent incarceration had violated her rights under the Fourth and Fourteenth Amendments and that the search of her property violated her rights under the Fourth Amendment. She also alleged pendent state claims against these defendants for false

imprisonment, malicious prosecution,[5] and intentional infliction of emotional distress. Hart alleges that Starnes and O'Brien inserted false statements into the affidavit either intentionally or with reckless disregard for the truth. Hart's theory is that the officials knew she was not involved in Conine's marijuana cultivation, but, in order to pressure her into providing evidence against him, they arrested her, charged her with a drug offense, detained her without bail for a day, and then did nothing to try to free her during the two weeks or so she remained jailed.

At this point, it is worth summarizing the officials' involvement in this matter. O'Brien and Montana jointly supervised the surveillance and search of the property. O'Brien requested the warrant. O'Brien and Montana instructed the officers to execute the warrant by arresting Hart and taking her to jail. Myrick did not participate in the surveillance, but he was involved in the search of the property and Hart's arrest. After the search, Motley took Hart to jail and signed the initial criminal complaint against her, writing "federal hold" on it. O'Brien signed a new criminal complaint against Hart the next day. Starnes advised the officers during the investigation, assisted O'Brien in the preparation of the warrant application, and was present during the execution of the warrant.

Starnes, Motley, Myrick, and Red River County moved for summary judgment on various grounds. In particular, Starnes asserted absolute and qualified immunity against the federal claims and Motley and Myrick

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[5] Hart did not sue Myrick or the county for malicious prosecution.

claimed qualified immunity against the federal claims. Also, O'Brien and Montana moved for summary judgment, professing that they were qualifiedly immune against the federal claims and officially immune against the state ones. After Hart filed her response to the summary judgment motions, O'Brien and Montana filed an "objection" to certain evidence that Hart submitted in response to their particular motion.

The district court then (1) granted the county summary judgment; (2) granted Myrick summary judgment based on qualified immunity on the federal claims and as a matter of law on the intentional infliction of emotional distress claim; (3) denied the remaining motions for summary judgment; and (4) dismissed the objection to certain of Hart's evidence as moot.

In this interlocutory appeal, all the officials assert that the district court erred in denying their motions for summary judgment on the grounds of immunity; Starnes asserts that he has absolute or qualified immunity, and O'Brien, Motley, Montana, and Myrick aver that they have qualified and official immunity. In addition, O'Brien and Montana argue that the district court erred in refusing to strike certain evidence Hart submitted in opposition to their summary judgment motion.

Hart disputes these contentions. She also maintains that we do not have jurisdiction over the interlocutory appeal.

II

We review *de novo* the denial of a motion for summary judgment on the grounds of qualified or absolute immunity. *Nerren v. Livingston Police Dep't*, 86 F.3d 469, 470 & n. 1 (5th Cir.1996). In doing so, we employ the same criteria as the district court, and construe all facts and inferences in the light most favorable to the nonmoving party. *Id.*; *LeJeune v. Shell Oil Co.*, 950 F.2d 267, 268 (5th Cir.1992). Summary judgment is appropriate where the moving party establishes that "there is no genuine issue of material fact and that [it] is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The moving party must show that, if the evidentiary material of record were reduced to admissible evidence in court, it would be insufficient to permit the nonmoving party to carry its burden of proof. *Celotex v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986).

Once the moving party has carried its burden under Rule 56, "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (citations omitted). The opposing party must set forth specific facts showing a genuine issue for trial and may not rest upon the mere allegations or denials of its pleadings. Fed.R.Civ.P. 56(e); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

III

We must first examine the basis of our jurisdiction. *Mosley v. Cozby*, 813 F.2d 659, 660 (5th Cir.1987). A court of appeals has jurisdiction of appeals from all final district court decisions. 28 U.S.C. § 1291. Under the collateral order doctrine, however, interlocutory appeals from district court orders denying summary judgment on the basis of absolute or qualified immunity may be immediately appealed, assuming these orders are based on an issue of law. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2816, 86 L.Ed.2d 411 (1985).

Recently, the Supreme Court clarified the scope of *Mitchell*. In *Johnson v. Jones*, 515 U.S. 304, 312, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995), the Court distinguished between orders that resolve legal wrangles and those that determine "evidence sufficiency" disputes. If, for example, the district court denies summary judgment on the basis that, given the set of undisputed facts, the defendant official's conduct was not objectively reasonable in light of clearly established law, the official may seek immediate appeal. If the district court denies summary judgment on the grounds that *material* facts exist which a party may or may not be able to prove at trial, the official must await final judgment before appealing. *Id.*

In *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996), the Supreme Court interpreted its holding in *Johnson*. It emphasized that *Johnson* did *not* stand for the proposition that a party must delay an appeal until final judgment if the district court based

summary judgment on an evidence sufficiency determination, *i.e.*, if the court determined that "material issues of fact remained." If that were true, then a party could never appeal a denial of summary judgment. Rather, the *Behrens* court ruled, *Johnson* merely held that:

> determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the plaintiff's claim, and hence there is no "final decision" under . . . *Mitchell*.

Id. ___ U.S. at ___, 116 S.Ct. at 842.[6]

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[6] In *Johnson*, the defendant officers claimed that they did not beat the plaintiff and were not present while others beat him. The district court determined that a triable issue existed on that point, and denied summary judgment in favor of the officers. The Supreme Court ruled that this denial could not be appealed until final judgment.

In *Behrens*, the defendant was a supervisory agent of the Federal Home Loan Bank Board and responsible for monitoring the operations of a thrift. The defendant wrote the thrift, suggesting that it replace its managing officer, the plaintiff in the action. The thrift then asked the plaintiff to resign; when he refused, it fired him. The defendant did not dispute his actions. Rather, he moved for summary judgment, contending that he had not violated any of the plaintiff's clearly established rights regarding his employment. The district court denied the motion. The Supreme Court held that this denial could be immediately appealed.

In the instant case, the district court did not deny summary judgment because there is a genuine dispute of material fact that the officials are responsible for searching Hart's home, arresting her, and not taking any action to end her detention. The parties did not disagree over whether the officials had engaged in such conduct. Rather, the court denied summary judgment because (1) "disputed issues of material fact" existed over whether the officials violated Hart's clearly established constitutional rights of which a reasonable person would have known under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978), *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), and similar cases and (2) the underlying facts are too unsettled to determine if the officials acted with objective reasonableness. In short, the district court determined that there were sufficient uncontested facts to establish that the officers engaged in the conduct in question, but that there were insufficient uncontested facts to decide whether the officials enjoyed immunity as a matter of law. Hence, the officials may argue on interlocutory appeal (as they do here) that, contrary to the district court's judgment, enough uncontested facts exist to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. *Behrens*, ___ U.S. at ___, 116 S.Ct. at 842; *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir.1997).

Accordingly, under *Mitchell*, *Johnson*, and *Behrens*, we have jurisdiction over the officials' interlocutory appeal of the district court's denial of summary judgment on the grounds of immunity for Hart's section 1983 claims. This means that we also have jurisdiction over the officials'

appeal of denial of summary judgment on the grounds of immunity for Hart's state claims. *Cantu v. Rocha*, 77 F.3d 795, 803-04 (5th Cir.1996).

IV

O'Brien and Montana filed an "objection" to certain evidence that Hart submitted in response to their summary judgment motion. Specifically, they allege (1) that statements made in connection with the "federal hold" are inadmissible under Rules 602 and 802 of the Federal Rules of Evidence and (2) that a statement made by Motley regarding the alleged motivation for arresting Hart is inadmissible under Rule 602 and in violation of Rule 56(e) of the Federal Rules of Civil Procedure.[7] The district court held that "[b]ecause the disposition of defendant's motion for summary judgment does not turn in any way on the consideration of the disputed evidence, the motion to strike is denied as moot." Defendants, however, assert that the district court nevertheless considered both pieces of evidence in denying their motion and allege that the court erred in refusing to strike the evidence from the summary judgment record. While we review the district court's denial of summary judgment on grounds of immunity *de novo*, we review evidentiary

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[7] Rule 602 provides that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Rule 802 forbids inadmissible hearsay. Rule 56(e) requires affidavits to be "made on personal knowledge [and to] set forth such facts as would be admissible in evidence. . . . "

rulings for manifest error. *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 195 (5th Cir.1996).

A

Hart testified in her deposition that her neighbor had told Hart that, on the first day of Hart's detention, the neighbor had attempted to arrange for a bail bondsman to bail her out of jail. In addition, Hart testified that Shelly Dodson, a trustee at the Red River County jail, had told her that someone at the jail had informed the bail bondsman that Hart could not be released because of the federal hold. Hart did not offer affidavits or deposition testimony from either her neighbor, Dodson, or the bail bondsman in opposition to defendants' summary judgment motion.

O'Brien and Montana assert that this evidence is inadmissible hearsay. Moreover, they assert that, even though the district court disavowed any reliance on Hart's testimony, the court nonetheless considered the evidence. In support of their assertion, they cite the following statement by the court: "The plaintiff . . . contends that her bail was denied because Motley . . . falsely told the justice of the peace that a 'federal hold' had been placed on Hart's property." However, this statement is not a finding of the district court; it is merely a statement of Hart's claim and theory of the case. Moreover, the district court explicitly set forth the evidence it considered in support of Hart's theory – undisputed evidence that the words "bail denied federal hold" appear on the criminal complaint signed by Motley and the fact, also undisputed by the parties, that there is no such thing

as a "federal hold." The court nowhere mentions the challenged hearsay testimony. We therefore find that the district court did not rely on Hart's testimony, even though it did not explicitly strike the evidence from the summary judgment record.

However, insofar as Hart's testimony is relevant to our *de novo* review of defendants' summary judgment motion, we decline to consider it. Hart's testimony concerning what Dodson told her about what a third-party said to a bail bondsman is inadmissible double hearsay under Fed.R.Evid. 801 and 802 and does not otherwise fall within an exception to the hearsay rule.

B

O'Brien and Montana next challenge the following statement offered by Hart in her brief in opposition to summary judgment: "Defendant Former Deputy Motley admits that he may have thought that Plaintiff Hart was taken to jail in an effort to get her to testify against Mr. Conine. In fact, he states that today he might believe that intent was the motivating force behind the decision to have Plaintiff Hart arrested and carried to jail." In her response to the summary judgment motion, Hart cites to the following exchange from Motley's deposition:

> Q: Is it your view that Ms. Hart was taken to jail, and that you were told to take her to jail, in an effort to get her to testify on Conine?
>
> A: No.
>
> Q: Have you ever told anybody that?
>
> A: No.

. . .

Q: In fact, isn't it your view that the motivating force behind the decision to have Ms. Hart arrested and carried to jail was to get her to testify against Conine?

A: No.

. . .

Q: Well, you don't remember believing that?

A: I might think that today.

Q: Okay. Well, that's what I'm trying to find out.

A: It wasn't my case. All I did was transport her.

O'Brien and Montana argue that Motley's statement concerning the other officers' motivation in arresting her is speculative and inadmissible under Fed.R.Evid. 602.

The officers assert that the district court relied on this evidence by pointing to the following statement by the district court: "Hart's theory of events is essentially that the defendants knew she was not guilty of any illegal activity, but arrested her, filed criminal charges against her, and held her in jail without bail in order to pressure her into providing incriminating information about Conine." Once again, the district court explicitly set forth the evidence it considered with respect to Hart's theory: evidence that Montana told her "Your ass is in trouble, you better sing like a bird," Hart's testimony that Motley told her several days after her arrest that he thought she was innocent, and Motley's deposition testimony that he does

not recall making such a statement to Hart. The district court did not mention the challenged evidence.

The officers argue that the district court nonetheless relied on the challenged evidence when it determined that "making all inferences in the plaintiff's favor, . . . Motley signed a criminal complaint against Hart when he knew she had committed no crime." However, this conclusion is supported by the evidence upon which the district court explicitly stated that it would rely – that is, Hart's testimony that Motley told her he thought she was innocent. We find no evidence that the district court relied on the challenged evidence in denying summary judgment.

Furthermore, we decline to consider Motley's deposition testimony concerning the motivation of the other officers in our *de novo* review of the summary judgment evidence. Under Rule 602, lay witnesses may offer opinion testimony about matters of which they have personal knowledge. *See* Fed.R.Evid. 602. This may include the motivation or intent of another person, if the witness has an adequate basis for his or her opinion, such as personal knowledge or an opportunity to observe the surrounding circumstances. *Hansard v. Pepsi-Cola Metropolitan Bottling Co.*. 865 F.2d 1461, 1466-67 (5th Cir.), *cert. denied*, 493 U.S. 842, 110 S.Ct. 129, 107 L.Ed.2d 89 (1989) (allowing lay witness, "with some hesitancy," to testify concerning motivation for plaintiff's employment termination). *See also John Hancock Mut. Life Ins. Co.*, 585 F.2d 1289, 1294 (5th Cir.1978) (allowing witness who observed altercation first hand to testify to victim's belief that his wife would never shoot him); *Bohannon v. Pegelow*, 652 F.2d 729, 732 (7th Cir.1981) (permitting witness who had observed

arrest to testify that she believed arrest was motivated by racial prejudice).

In this case, however, the court has no means by which to evaluate the basis for Motley's testimony. Motley did not participate in the investigation or surveillance, was not present until the day of the arrest, and did not participate in the decision to arrest Hart. Motley's deposition testimony does not reveal whether his current belief is based on observations gathered at or around the time of the arrest itself. In short, we have no assurance that Motley has sufficient personal knowledge to draw a reliable conclusion about the officers' motivations. Therefore, we find that Motley's testimony is inadmissible under Rules 602 and 701, and we will not consider the evidence in our review of the district court's denial of summary judgment as to O'Brien and Montana.[8]

V

Starnes alleges that the district court mistakenly decided that he did not have absolute immunity as a matter of law against Hart's federal claims. In making this determination, the district court found that Starnes' "primary role was as a legal advisor to the officers conducting the investigation and executing the search."

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[8] Motley's opinion may be admitted against him pursuant to Fed.R.Evid. 801(d)(2) as an admission of a party opponent. However, as we discuss below, the officers reasonably believed they had probable cause to detain Hart, and their intent to question her about Conine does not make the arrest actionable under section 1983.

Starnes disputes this finding. We review denial of summary judgment *de novo*. *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir.1997). In determining whether a genuine issue of material fact remains on this point, we do not review whether the evidence "could support a finding that particular conduct occurred," *Behrens*, ___ U.S. at ___, 116 S.Ct. at 842, but we may "take, as given, the facts that the district court assumed when it denied summary judgment" and determine whether those facts state a claim under clearly established law. *Cantu v. Rocha*, 77 F.3d 795, 803 (5th Cir.1996).

We normally look to state law to determine the lawfulness of an arrest by a state officer for a state offense. *Michigan v. DeFillippo*, 443 U.S. 31, 36, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979); *Ker v. California*, 374 U.S. 23, 37-38, 83 S.Ct. 1623, 1632, 10 L.Ed.2d 726 (1963) (plurality). However, in a section 1983 action, a plaintiff alleging unlawful search and arrest by state officers asserts that he was deprived of rights secured by the federal constitution or federal statute. Therefore, state law governing searches and arrests does not control. *Fields v. City of S. Houston*, 922 F.2d 1183, 1189-90 & n. 7 (5th Cir.1991).

The Supreme Court has adopted a "functional approach" to the question of absolute immunity, one that looks to "the nature of the function performed, not the identity of the actor who performed it." *Imbler v. Pachtman*, 424 U.S. 409, 431, 96 S.Ct. 984, 995, 47 L.Ed.2d 128 (1976). A prosecutor is absolutely immune for initiating and pursuing a criminal prosecution. Specifically, a prosecutor is absolutely immune when he acts in his "role as advocate for the State," *Burns v. Reed*, 500 U.S. 478, 491, 111 S.Ct. 1934, 1942, 114 L.Ed.2d 547 (1991) (internal

quotation marks omitted), or when his conduct is "intimately associated with the judicial phase of the criminal process." *Id.* at 492, 111 S.Ct. at 1942 (internal quotation marks omitted). However, a prosecutor does not enjoy absolute immunity for acts of investigation or administration. *Buckley v. Fitzsimmons*, 509 U.S. 259, 273, 113 S.Ct. 2606, 2615, 125 L.Ed.2d 209 (1993).

A prosecutor has the burden of establishing that he was an "advocate" for each function at issue. *See Burns*, 500 U.S. at 486, 111 S.Ct. at 1939; *see also Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616 ("The question . . . is whether the prosecutors have carried their burden of establishing that they were functioning as 'advocates' when they were endeavoring to determine whether the bootprint at the scene of the crime had been made by petitioner's foot."). Even if a prosecutor fails to show absolute immunity for a given activity, he may still show qualified immunity. *Buckley*, 509 U.S. at 273, 113 S.Ct. at 2615-16.

Hart premises her claims against Starnes on four arguments. First, she alleges that Starnes knowingly or recklessly provided the false information in the warrant affidavit that Hart was married to Stanley Hart, a known drug cultivator. Second, she asserts that Starnes allowed the search and arrest to continue when he knew that the affidavit described the wrong Peggy Hart. Third, she avers that Starnes participated in the decision to place a federal hold on Hart. Fourth, she claims that Starnes went with O'Brien to visit Hart in jail to coerce her into providing information for the case against Conine.

A

Hart's first argument pertains to Starnes' function of providing information for inclusion in an affidavit supporting a warrant. With this function, Starnes acted as a legal adviser to the officers and, much like the officers who participated in the surveillance, an investigator. A prosecutor is not absolutely immune for giving legal advice to the police, *Burns*, 500 U.S. at 496, 111 S.Ct. at 1945, and a prosecutor who acts in the role of a policeman is liable like a policeman if, in so acting, he deprives a plaintiff of rights under the Constitution or federal laws. *Joseph v. Patterson*, 795 F.2d 549, 556 (6th Cir.1986), *cert. denied*, 481 U.S. 1023, 107 S.Ct. 1910, 95 L.Ed.2d 516 (1987). Moreover, "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616. In short, until charges have been filed against an individual, a prosecutor is not absolutely immune for cooperating with law enforcement officers in obtaining a search warrant against that person based on false information. *See Guerro v. Mulhearn*, 498 F.2d 1249, 1256 (1st Cir.1974) (ruling that prosecutor did not have absolute immunity where defendant alleged that prosecutor had cooperated with police defendants in obtaining a search warrant based on perjured testimony); *see also Barr v. Abrams*, 810 F.2d 358, 361-62 (2d Cir.1987) (ruling that prosecutors were absolutely immune for filing criminal information charging plaintiff with contempt and then applying to court for arrest warrant on that charge); *McSurely v. McClellan*, 697 F.2d 309, 320 (D.C.Cir.1982) (holding that prosecutor was only protected by qualified immunity for preparing pre-indictment search and arrest

warrants). Therefore, Starnes does not enjoy absolute immunity from liability arising out of the inaccurate information in the affidavit.

B

Hart's second argument deals with the "function" of preventing an arrest during the execution of a warrant after realizing that information in the affidavit supporting the warrant was inaccurate. "[A] prosecutor who assists, directs or otherwise participates with, the police in obtaining evidence prior to an indictment undoubtedly is functioning more in his investigative capacity than in his quasi-judicial capacities of deciding which suits to bring and . . . conducting them in court," and is thus only entitled to qualified immunity. *Marrero v. City of Hialeah*, 625 F.2d 499, 505 (5th Cir.1980) (citation and internal quotations omitted), *cert. denied*, 450 U.S. 913, 101 S.Ct. 1353, 67 L.Ed.2d 337 (1981); *see also Buckley*, 509 U.S. at 274, 113 S.Ct. at 2616 (noting that a prosecutor is not absolutely immune for planning and executing a raid on a suspected weapons cache).

However, Starnes may also enjoy absolute immunity under *Mays v. Sudderth*, 97 F.3d 107 (5th Cir.1996), for his refusal to prevent the search of Hart's home and her arrest during the execution of the warrant. In *Mays*, we held that "an official acting within the scope of his authority is absolutely immune from a suit for damages to the extent that the cause of action arises from his compliance with a facially valid judicial order issued by a court acting within its jurisdiction." *Id.* at 113. In reaching this conclusion, we determined that the common law

provided officials with such immunity at the time 42 U.S.C. § 1983 was enacted in 1871. *See Butz v. Economou*, 438 U.S. 478, 508, 98 S.Ct. 2894, 2912, 57 L.Ed.2d 895 (1978) (holding that to determine if government official is absolutely immune, court must undertake a considered inquiry into the immunity historically accorded the relevant official at common law and the interests behind it). We relied heavily on a Supreme Court decision, *Erskine v. Hohnbach*, 81 U.S. (14 Wall.) 613, 20 L.Ed. 745 (1871), which referred to absolute immunity for "ministerial officers acting in obedience to process, or orders issued to them by tribunals or officers invested by law with authority to pass upon and determine particular facts, and render judgment thereon. . . . " *Id.* at 616.

In the instant case, the magistrate ordered that the search and arrest warrant be carried out by "the Sheriff or any Peace Officer of Lamar County, Texas or any Peace Officer of the State of Texas." Starnes is not a sheriff or peace officer of Lamar County or the State of Texas, and is not otherwise mentioned in the warrant. *See* Tex. Penal Code Ann. § 1.07(a)(36) (defining "peace officer"); Tex.Code Crim. Proc. Ann. art. 2.12 (same); Tex.Code Crim. Pro. Ann. art. 15.01 ("A 'warrant of arrest' is a written order from a magistrate directed to a peace officer or some other person specially named, commanding him to take the body of the person accused of an offense. . . . "); *Deltenre v. State*, 808 S.W.2d 97 (Tex.Crim.App.1991) (discussing statutes). While Starnes was present during the search of Hart's property and her arrest, he was not acting in obedience to the magistrate's commands in the search and arrest warrant; the warrant was not even addressed to him. Thus, since Starnes was

not "comply[ing]" with the warrant, he may not be "clothe[d] . . . with the absolute judicial immunity enjoyed by the judge issuing the order." *Mays*, 97 F.3d at 108. He participated in the search and seizure at the peril of receiving only qualified immunity.[9]

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[9] This conclusion not only accords with our earlier decision in *Marrero*, but also with those of other circuits which have addressed the issue. *See Hummel-Jones v. Strope*, 25 F.3d 647, 653 & n. 10 (8th Cir.1993) (analyzing prosecutor's liability for participation in unreasonable search of birthing clinic under qualified immunity); *Day v. Morgenthau*, 909 F.2d 75, 78 (2d Cir.1990) (ruling that allegations suggesting that prosecutor may have participated in executing arrest were not covered by absolute immunity); *Mullinax v. McElhenney*, 817 F.2d 711, 715 (11th Cir.1987) (holding that prosecutors were only qualifiedly immune for their involvement in raid on jail cell); *Joseph*, 795 F.2d at 556 (holding that "we have no doubt" that prosecutor's participation in search with police of defendant's store that went beyond scope of warrant was not subject to absolute immunity); *McSurely*, 697 F.2d at 319-20 (holding that prosecutor was only entitled to qualified immunity for participating in raid); *Jacobson v. Rose*, 592 F.2d 515, 524 (9th Cir.1978) (holding that prosecutors who helped implement wiretap were not absolutely immune), *cert. denied*, 442 U.S. 930, 99 S.Ct. 2861, 61 L.Ed.2d 298 (1979); *Hampton v. City of Chicago*, 484 F.2d 602, 609 (7th Cir.1973) (holding that prosecutor, who allegedly participated in the planning and execution of a purportedly illegal raid on apartment, did not warrant absolute immunity any more than the police officers allegedly acting under his direction), *cert. denied*, 415 U.S. 917, 94 S.Ct. 1413, 39 L.Ed.2d 471 (1974); *cf. Pachaly v. City of Lynchburg*, 897 F.2d 723, 727 (4th Cir.1990) (finding that prosecutor was absolutely immune for participating in an allegedly illegal post-indictment search that the prosecutor asserted was necessary to obtain evidence to prosecute the indictment).

C

Hart's third contention deals with the function of recommending the denial of bail. This function is intimately associated with the judicial phase of the criminal process, and deals with the initiation and pursuit of criminal prosecution. In carrying it out, a prosecutor is acting as an advocate, rather than as an investigator or administrator, and enjoys absolute immunity against any claims arising out of this function. *See Lerwill v. Joslin*, 712 F.2d 435, 438 (10th Cir.1983) (stating that "a prosecutor's advocacy of a given amount of bail" is entitled to absolute immunity).

D

Finally, Starnes suggests that he is absolutely immune with regard to Hart's claim that he visited her in jail to pressure her to provide information against Conine. However, there is no dispute that, at the time of the visit, ample probable cause existed to arrest and detain Conine. Therefore, assuming Hart's characterization of the visit is correct, Starnes was simply attempting to gather information relevant to his prosecution of Conine. Accordingly, Starnes was acting as an advocate and is absolutely immune from Hart's claim here. *See Hill v. City of New York*, 45 F.3d 653, 662-63 (2d Cir.1995) (noting that prosecutor's interview of witness who allegedly made inculpatory statements about accused would only be investigatory function if prosecutor lacked probable cause to arrest accused and results of interview contributed to his finding of probable cause).

In sum, we find that Starnes is not absolutely immune for allegedly providing inaccurate information for the warrant affidavit, nor for allowing the search and arrest to continue when he knew that the affidavit described a different Peggy Hart; however, we find that he is absolutely immune from the claims that he participated in the decision to place Hart on federal hold and that he tried to coerce Hart into providing information about Conine. As to Hart's first two arguments, Starnes argues that he is immune from suit because of qualified immunity. We consider this claim in our discussion of the qualified immunity claims of the police officers in the next section.

VI

All the officials, including Starnes, aver that the district court erred in not granting them summary judgment on the grounds of qualified immunity against Hart's federal claims. Generally speaking, qualified immunity protects government officials performing discretionary functions from civil liability under federal law unless their conduct violates a "clearly established [federal] statutory or constitutional right[ ] of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). A plaintiff must show that "when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *Anderson v. Creighton*, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). In evaluating an immunity defense to a constitutional claim, the court must first determine whether the plaintiff has alleged the

violation of a constitutional right at all. *Siegert v. Gilley*, 500 U.S. 226, 232, 111 S.Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). We now examine in turn whether O'Brien, Montana, Motley, and Starnes enjoy qualified immunity.

A

Hart argues that O'Brien violated her Fourth Amendment rights in four different ways, and that he is not entitled to qualified immunity for any of them. First, he submitted the affidavit with the two inaccurate statements to the magistrate and requested the warrant without probable cause; second, he made the original decision to detain Hart; third, he placed Hart on "federal hold;" fourth, he permitted Hart to remain in jail even though he knew that there had not been probable cause to arrest her.

1

Hart contends that O'Brien violated her Fourth Amendment rights by submitting an affidavit to the magistrate without probable cause. Subsumed in the qualified immunity inquiry are two other questions involving the reasonableness, if any, of O'Brien's use of the inaccurate statements without further investigation. We will first consider whether O'Brien is immune for including the inaccurate statements in the affidavit of probable cause. Then we will consider whether he is immune from Hart's claim that he swore to an affidavit and conducted a search without sufficient facts to show probable cause.

Under *Siegert*, we must consider at the threshold whether Hart even alleges a Fourth Amendment violation

with regard to the false information claims. 500 U.S. at 232, 111 S.Ct. at 1793. The Supreme Court in *Franks v. Delaware* established that an officer is liable for swearing to false information in an affidavit in support of a search warrant, provided that: (1) the affiant knew the information was false or would have known it was false except for the affiant's reckless disregard for the truth; and (2) the warrant would not establish probable cause without the false information. 438 U.S. at 171, 98 S.Ct. at 2684. Allegations of negligence or innocent mistake are insufficient. *Id.* Therefore Hart's claim that O'Brien was at least reckless in including the inaccurate statements states a valid cause of action under the Fourth Amendment.

Next, we will consider whether O'Brien's sworn statement that Hart lived in Conine's trailer was knowingly false or reckless. O'Brien argues that, based on the surveillance observations, reasonable police officers would agree with the conclusion that Hart was residing in the trailer. Indeed, the officers saw that Hart spent a great deal of time with Conine during the surveillance period. The undisputed facts establish that she went on a trip out of town with Conine and was observed upon her return carrying clothing from the car into the trailer; she was in the trailer at least part of the time during the visit of a known marijuana grower; she performed certain domestic chores in and around the trailer; and she stayed overnight in the trailer at least four times. O'Brien stated in the affidavit for probable cause that the property had been under almost continuous surveillance during the two weeks in question; therefore it is reasonable to assume that Hart spent the other nights during the two-week surveillance away from the trailer.

Hart said that she lived in the white house with black trim during this time. However, since Hart did not own the house, even a reasonable investigation into property records would not have established that Hart lived there. Hart later testified that she did not hold title to the house or surrounding property; she was living there by herself with permission of the owner. More importantly, there is evidence suggesting that a reasonable police officer may have thought that Hart had established a second residence in Conine's trailer. *See United States v. Risse*, 83 F.3d 212, 216 (8th Cir.1996) (rejecting defendant's argument that because officers knew defendant had other residence, they could not have reasonably believed defendant lived at premises searched; "[w]e have found no authority . . . that a person can have only one residence for Fourth Amendment purposes."); *Washington v. Simpson*, 806 F.2d 192, 196 (8th Cir.1986) (finding that suspect "resided" at the house, for purposes of entering premises to execute arrest warrant, when she stayed there two to four nights per week, kept certain personal belongings there, and gave that address as residence when booked by police).

We are confident that a reasonably competent officer in O'Brien's position would conclude that Hart resided at the trailer. O'Brien's conclusion was not knowingly inaccurate, and although it was not ineluctable from what he observed, its inclusion in the affidavit was not reckless. Therefore, qualified immunity will protect O'Brien from suit on the basis of this inaccuracy in the affidavit. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684.

Second, we consider whether O'Brien reasonably relied on Starnes's statement that plaintiff Hart was married to known drug cultivator Stanley Hart. As an initial matter we note that the statement that "Peggy Hart is married to Stanley Hart, who according to DTF files, is a known marihuana cultivator in Red River County, Texas" is technically "true." *A* Peggy Hart *was* married to Stanley Hart. However, it would be absurd to wrest this sentence out of the context of the affidavit. We must interpret affidavits for arrest or search warrants in a commonsense and realistic manner. *United States v. Ventresca*, 380 U.S. 102, 108, 85 S.Ct. 741, 746, 13 L.Ed.2d 684 (1965). Obviously, this reference to "Peggy Hart [being] married to Stanley Hart" was intended to refer to the "Peggy Hart" in whose car the "unknown white female" was seen driving. And *that* Peggy Hart (who was also the "unknown white female") was the plaintiff, Peggy Nell Hart.

It is theoretically possible that O'Brien may have been able to determine that the statement was inaccurate through additional investigation. For instance, O'Brien had discovered that a couple of the cars on the property were registered to a Peggy Hart. Perhaps he may have been able to ascertain from public records that the Peggy Hart who lived near Conine was a different person than the Peggy Hart who was married to Stanley Hart. However, the summary judgment evidence adduces no genuine issue that additional investigation would have revealed this mistake. In addition, the information that Hart was married to Stanley Hart was somewhat in tension with the other information in the affidavit that Hart resided with Conine; perhaps this information should

have prompted additional investigation. Once again, the summary judgment record leaves us to speculate whether such additional investigation would have been fruitful. We have reviewed the summary judgment record thoroughly, and conclude that there is no genuine issue that a more extensive investigation would have established that there were two Peggy Harts.

Moreover, it is uncontested that O'Brien obtained the information about Hart being married to Stanley Hart from Starnes after O'Brien had concluded his investigation and as he was preparing his affidavit. O'Brien testified that, for this reason, he did not independently investigate the accuracy of the information. A reasonably competent officer might rely without investigation on information from a trustworthy source such as a prosecutor, especially if the prosecutor indicates that the information comes from law enforcement records. The summary judgment record contains no indication that O'Brien had reason to believe that there were two Peggy Harts within the county, or that the Peggy Hart that Starnes knew about (who was linked to a known marijuana cultivator) was *different* from the Peggy Hart who owned the cars seen on the property (who was also linked to a different known marijuana cultivator).

Under the circumstances, we find that a reasonably competent police officer would have thought that the statement had sufficient internal indicia of reliability to be included in the affidavit without further investigation (though they would have attributed the statement to Starnes). O'Brien's use of Starnes's statement may or may not have been negligent, but O'Brien was not *reckless* in including it in the affidavit. Therefore he is qualifiedly

immune from suit based on this error in the affidavit. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684.

We turn to the broader issue: whether O'Brien's reasonable belief that Hart resided at the trailer and was married to a known marijuana cultivator, coupled with the other evidence, is sufficient to establish that he reasonably thought that there was probable cause to search Hart's home and arrest her.

The objective standard of *Harlow* applies to claims of unlawful search and arrest such as this, in which the plaintiff alleges that the officer who requested the warrant intentionally or recklessly sought an affidavit without probable cause. "Only where the warrant application is so lacking in indicia of probable cause as to render official belief in its existence unreasonable, will the shield of immunity be lost." *Malley v. Briggs*, 475 U.S. 335, 344-45, 106 S.Ct. 1092, 1098, 89 L.Ed.2d 271 (1986) (citation omitted); *see also Anderson*, 483 U.S. at 644-45, 107 S.Ct. at 3041-42 (applying *Malley* to unconstitutional searches). The crucial issue "is whether a reasonably well-trained officer in [the defendant's] position would have known that the affidavit failed to establish probable cause and that he should not have applied for the warrant." *Malley*, 475 U.S. at 345, 106 S.Ct. at 1098. The officer "will not be immune if, on an objective basis, it is obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Id.* at 341, 106 S.Ct. at 1096. In other words, there must not even "arguably" be probable cause for the search and arrest for immunity to be lost. *Santiago v. Fenton*, 891 F.2d 373, 386 (1st Cir.1989).

Probable cause does not require proof beyond a reasonable doubt, but only a showing of the probability of criminal activity. *United States v. Brown*, 941 F.2d 1300, 1302 (5th Cir.), *cert. denied*, 502 U.S. 1008, 112 S.Ct. 648, 116 L.Ed.2d 665 (1991). A magistrate's findings on the issue of probable cause are entitled to great deference. *Id.*

"Probable cause exists when the facts available at the time of the arrest would support a reasonable person's belief that an offense has been, or is being, committed and that the individual arrested is the guilty party." *Blackwell*, 34 F.3d at 303. Probable cause may exist even though officers have observed no unlawful activity and are unaware of the identity of a defendant. *United States v. Pentado*, 463 F.2d 355, 361 (5th Cir.), *cert. denied*, 409 U.S. 1079, 93 S.Ct. 698, 34 L.Ed.2d 668 (1972) *and cert. denied*, 410 U.S. 909, 93 S.Ct. 963, 35 L.Ed.2d 271 (1973). "The observation of unusual activity for which there is no legitimate, logical explanation can be the basis for probable cause." *United States v. Alexander*, 559 F.2d 1339, 1343 (5th Cir.1977), *cert. denied*, 434 U.S. 1078, 98 S.Ct. 1271, 55 L.Ed.2d 785 (1978).

However, "a person's mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person." *Ybarra v. Illinois*, 444 U.S. 85, 91, 100 S.Ct. 338, 342, 62 L.Ed.2d 238 (1979) (citing *Sibron v. New York*, 392 U.S. 40, 62-63, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968)). "Where the standard is probable cause, a search or seizure of a person must be supported by probable cause particularized with respect to that person." *Id.*

The evidence in the affidavit includes the following: (1) Conine "and/or" the "unknown white female" with Hart's physical characteristics have entered the "white frame house with black trim and shutters" (i.e., Hart's house), (2) a couple of Hart's cars are on the property to be searched, (3) the "unknown white female" was seen driving one of Hart's cars, and (4) Conine and the "unknown white female" are "in charge of and controlled" the property. In addition, because we have decided that O'Brien's inclusion of inaccurate statements was not reckless under *Franks*, we must also consider O'Brien's belief that Hart lived in the trailer with Conine and that Hart was married to a known drug cultivator, in determining whether O'Brien reasonably believed probable cause existed.

Some of these statements are not very probative of probable cause. For example, the fact that Hart's house and cars are on the property to be searched is not suspicious, given the fact that her house happened to be near Conine's trailer and she would have been expected to park her cars near her home. The fact that Hart often visited the trailer and sometimes stayed overnight, or the fact that she would sometimes go to Conine's barn, do not establish that she was growing marijuana with Conine. There is no undisputed evidence that she visited the marijuana patches on the property to be searched. Finally, the officials neither saw nor found any evidence of drugs or drug paraphernalia in Hart's home or on her property, the only areas indisputably under her control.

However, from the perspective of the officers, Hart lived smack-dab in the middle of 1,132 marijuana plants, 188 of which were located directly behind her house. She

spent a fair amount of time with Conine and in his trailer, and she appeared to reside in the trailer with a suspected (and previously convicted) marijuana cultivator. She also appeared to the officers pursuing the warrant to be married to another marijuana cultivator. She had been present when a known drug cultivator visited Conine, and she had driven with Conine to the gate of the trash dump adjacent to Conine's illicit crops.

It was clear in this case from the presence of the marijuana crops that a crime was being committed; nevertheless, the evidence connecting Hart to the crime was thin. It is not a crime under federal law or Texas law to maintain a social relationship with a drug cultivator. The question in qualified immunity, however, is not whether the officers actually had probable cause, but rather whether they acted recklessly in swearing a warrant based on the information they possessed. The officers lose their immunity only if it is "obvious that no reasonably competent officer would have concluded that a warrant should issue; but if officers of reasonable competence could disagree on this issue, immunity should be recognized." *Malley*, 475 U.S. at 341, 106 S.Ct. at 1096. In this case, the call on probable cause was very close, and we cannot say that no reasonable officer would have thought he had probable cause to arrest Hart. Our conclusion is bolstered by the fact that the neutral and detached magistrate, faced with the same facts, determined that probable cause existed. This tends to support the reasonableness of the officers' request for the warrant based on their observations.

The officers may have been negligent in their investigation, and wrong to conclude that they had probable

cause. However, negligence is insufficient to create liability for police officers under *Malley*. Therefore we find that O'Brien is protected by qualified immunity on this point.

2

Hart alleges that O'Brien violated her constitutional rights by instructing Motley to take her in to the police station without probable cause, even though Montana made the actual decision to take her into custody. Hart's allegations against O'Brien do not state a constitutional claim, because O'Brien and the other officers were directed by the probable cause warrant to arrest Hart. Hart does not contend that the warrant for her arrest was facially invalid, nor that the officers executed the warrant in any way other than that prescribed by the judge. We have stated that police officers acting pursuant to a facially valid judicial warrant enjoy qualified immunity for executing the warrant. *Hamill v. Wright*, 870 F.2d 1032, 1036 (5th Cir.1989). O'Brien was strictly complying with a facially valid judicial order, issued by a court acting within its jurisdiction, and he is therefore entitled to qualified immunity on this claim.[10]

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[10] In addition, O'Brien and the other officers would have been entitled to absolute immunity for executing a facially valid warrant issued by a court of competent jurisdiction. *Mays*, 97 F.3d at 108. However, none of the officers moved for summary judgment on grounds of absolute immunity.

Motley testified that O'Brien instructed him to put Hart on federal hold to ensure that she stayed in jail until federal DEA officers could speak to her. The magistrate claims in an affidavit that he does not "recall" there being a federal hold or any discussions about a federal hold, and states that any such hold would not have affected the length of Hart's stay in jail. The magistrate avers that he would have denied bail for a day regardless of whether there was a federal hold because the "investigation scene was still ongoing." However, the sheriff at the time and Hart herself have testified that they each believed that the magistrate denied bail because of the federal hold.

The federal hold remained in place for one day. Hart alleges that O'Brien violated due process by causing her to be denied bail by falsely suggesting to the magistrate (through Motley) that there was a federal detainer on her. If a state detainee has an outstanding federal warrant or has been indicted on federal charges, a federal official may place a detainer on the detainee, asking the state to hold him for federal authorities. *Davis v. Attorney General,* 425 F.2d 238, 239 (5th Cir.1970). Presented with a federal detainer, the state may deny the detainee bail, hold him in custody pursuant to state law, and then turn him over to the federal government for prosecution. *Reno v. Koray,* 515 U.S. 50, 62 n. 5, 115 S.Ct. 2021, 2028 n. 5, 132 L.Ed.2d 46 (1995); *United States v. Dovalina,* 711 F.2d 737, 740 (5th Cir.1983).

In this case, no federal detainer existed. Moreover, there was no basis for such a detainer since the federal

government had not charged Hart with anything. Motley's explanation for the "federal hold" – that O'Brien wanted to assure that Hart would be available to be interviewed by federal agents – does not justify detention without bail. *See* 18 U.S.C.App. 2 (interstate agreement on detainers); Tex.Code Crim. Pro. Ann. art. 51.14 (same).

However, causation is an element of a section 1983 claim; O'Brien's actions must have actually caused the deprivation of liberty of which Hart complains. *See* 42 U.S.C. § 1983 (providing that a state official is only liable where he "subjects, or causes to be subjected" a person to deprivation of any rights, privileges, or immunities secured by Constitution and laws). The magistrate denied Hart bail on the first day of her detention only; Hart, however, was unable to post bail for over two weeks after her initial confinement. We can reasonably assume, then, that she could not have posted bail one day after her initial confinement had it been set, and thus that the federal hold had no effect on the length of her detention.[11] Therefore, Hart did not suffer any loss of liberty caused by O'Brien's actions. Accordingly, Hart has failed to state a constitutional claim against O'Brien based on denial of bail; *Siegert* therefore dictates that qualified immunity bars this claim as well. 500 U.S. at 232, 111 S.Ct. at 1793.

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[11] Given that the magistrate later set bail at $50,000, Hart cannot reasonably claim that the magistrate would have released her on her own recognizance on the first day of her detention absent O'Brien's alleged misconduct.

Hart alleges that O'Brien is responsible for damages stemming from her two-week detention because he did not disclose "patently exculpatory evidence" to the prosecutor, namely his alleged knowledge that there was no probable cause for her arrest. Police detainer, even of one innocent of any wrongdoing, pursuant to a valid warrant does not give rise to a constitutional claim. *Baker v. McCollan*, 443 U.S. 137, 143-44, 99 S.Ct. 2689, 2694, 61 L.Ed.2d 433 (1979) (holding that police detainer of misidentified suspect for three days, pursuant to a valid warrant, does not state a claim under section 1983). However, a plaintiff states a section 1983 claim against a police officer who, after learning of "patently exculpatory evidence," deliberately fails to disclose it to the prosecutor. *Sanders v. English*, 950 F.2d 1152, 1162 (5th Cir.1992). Such deliberate concealment can be the basis for an inference that a defendant police officer maliciously initiated and maintained a prosecution. *Id.* at 1163.

In *Sanders*, a police lieutenant arrested a robbery suspect after a victim identified him. *Id.* at 1156. In the days immediately following the arrest, several people brought exculpatory evidence to the lieutenant's attention: people told the officer, for example, that the victim and Sanders (the arrestee) were related, calling into question the victim's inability to identify Sanders until several days after the crime in an informal lineup; an eyewitness who had helped police artists compose a sketch of the suspect told the officer that Sanders was the wrong person; other victims of the same assailant were unable to identify Sanders as their assailant; and a few days after

the arrest, the lieutenant learned that Sanders had a credible alibi supported by three witnesses. *Id.* Faced with all of this evidence showing that Sanders was not the robber, the police lieutenant "deliberately looked the other way in the face of exonerative evidence indicating that he had arrested the wrong man. . . . "

There is no similar exculpatory evidence in the instant case. Hart alleges that O'Brien knew there was no probable cause to arrest her, but refused to notify prosecutors of this fact. Hart cites O'Brien's later deposition in which he testified that "the target of the investigation was Mr. Conine. And Mr. Conine's property. . . . We wasn't [sic] going down there to try to arrest [Hart] and send her to the penitentiary. We was [sic] after Mr. Conine, his property, and his weed, we believed to be his marijuana." In addition, O'Brien admitted that he visited Hart in jail to encourage her to provide information against Conine. None of this constitutes "patently exculpatory evidence," however, because it does not tend to show that Hart was not guilty.

Even if Conine was the primary target of the investigation and Hart's arrest were merely pretextual, the lawfulness of Hart's arrest does not depend on the actual motivations of the arresting officers. *Whren v. United States*, ___ U.S. ___, ___, 116 S.Ct. 1769, 1774, 135 L.Ed.2d 89 (1996) (holding that the proper focus of Fourth Amendment inquiry is objective conduct, and not subjective intent, of police officer); *Anderson v. Creighton*, 483 U.S. 635, 641, 107 S.Ct. 3034, 3040, 97 L.Ed.2d 523 (1987) (noting that malignant motive of officers is irrelevant under *Harlow* test to question of qualified immunity); *United States v. Causey*, 834 F.2d 1179 (5th Cir.1987) (en

banc) (holding that pretextual arrest did not violate Fourth Amendment where arrest was objectively supported by probable cause).

In addition, this case presents facts almost opposite of *Sanders*. O'Brien and the other officers at this point knew that Hart had spent much time in Conine's trailer, and that the trailer was littered with drugs, drug paraphernalia, and cash. After they arrested her, they certainly had some evidence that Hart knew about Conine's illicit activities. This evidence is inculpatory, not exculpatory, and further supports the officers' decision to keep Hart in jail. We therefore find that O'Brien was immune from suit for illegal detention as well.

In sum, O'Brien enjoys qualified immunity from suit for intentionally or recklessly including incorrect statements in the affidavit, for his instruction to other officers to arrest Hart, for pursuing the warrant, for illegal detention, and for recommending that Hart be held pursuant to a federal hold.

B

Hart claims that Montana and Motley violated her Fourth Amendment rights – Montana by instructing Motley to take her into custody, and Motley by taking her to jail. She also claims that both are liable for their participation in the discussion and decision to impose a federal hold, and for deliberately withholding exculpatory information from the prosecutor.

As suggested above, Montana and Motley are qualifiedly immune for the decision to arrest Hart and for

taking her to jail, because they were acting pursuant to a facially valid warrant issued by a court of competent jurisdiction. *Hamill*, 870 F.2d at 1036. There is some proof that, shortly after Hart's arrest, Montana told her something to the effect that her "ass is in a world of trouble" and she needed to "sing like a bird" against Conine, suggesting that Montana kept Hart detained *only* to elicit evidence against Conine. There is also some evidence that Motley heard these statements.

The question of whether the officers had probable cause to keep Hart incarcerated is different from the question of whether they had probable cause to arrest her. Nonetheless, just as in the context of Hart's claims against O'Brien, we find that Hart does not state a claim for illegal detention. Montana withheld no exculpatory evidence from the prosecutor, and he had a reasonable belief that there was probable cause to detain her, pursuant to a facially valid warrant. Therefore, the fact that he wanted to question her about Conine is not, in itself, actionable under section 1983. Furthermore, as suggested above, even construing the facts in the light most favorable to Hart, Montana's and Motley's participation in imposing a "federal hold" does not amount to a constitutional violation. Hart did not suffer any loss of liberty caused by their actions.

Therefore, Montana and Motley are entitled to qualified immunity on all of Hart's allegations against them.

C

Starnes's claim to qualified immunity is on slightly different footing because he is not a police officer. In

section V, we held that Starnes was absolutely immune from Hart's claims that he participated in the decision to place her on "federal hold" and that he tried to persuade her to provide information about Conine. We now consider whether Starnes is qualifiedly immune from Hart's claims stemming from the fact that he provided inaccurate information for the warrant affidavit (i.e., the statement about Hart being married to Stanley Hart, a known marijuana cultivator) and from the fact that, even after realizing that this information was incorrect, he refused to stop Hart's arrest.

1

Under *Siegert*, we must consider at the threshold whether Hart even alleges a Fourth Amendment violation with regard to the false information claim. 500 U.S. at 232, 111 S.Ct. at 1793. The Supreme Court in *Franks v. Delaware* established that a search violates the Fourth Amendment if it was conducted pursuant to a warrant issued by a magistrate who was misled by information in an affidavit, provided that the affiant knew the information was false or would have known it was false except for his reckless disregard for the truth. 438 U.S. at 171, 98 S.Ct. at 2684. However, Starnes is not the affiant in this case, and, taken at face value, *Franks* applies only to officers who sign a warrant affidavit or otherwise request a warrant under oath: "[t]he deliberate falsity or reckless disregard whose impeachment is permitted is only that of the affiant, not of any nongovernmental informant." *Id.*

However, we need not take *Franks* only at face value. The Court left open the possibility that a search or arrest

violates the Fourth Amendment where the affiant relies in good faith on deliberate or reckless misstatements by another governmental official in establishing probable cause. *See id.* at 164 n. 6, 98 S.Ct. at 2680 ("[P]olice [can] not insulate one officer's deliberate misstatements merely by relaying it through an officer-affiant personally ignorant of its falsity."). Several circuits have held that a deliberate or reckless misstatement or omission by a governmental official who is not the affiant may nevertheless form the basis of a *Franks* claim. *United States v. Wapnick,* 60 F.3d 948, 956 (2d Cir.1995), *cert. denied,* ___ U.S. ___, 116 S.Ct. 1672, 134 L.Ed.2d 776 (1996); *United States v. DeLeon,* 979 F.2d 761, 764 (9th Cir.1992); *United States v. Calisto,* 838 F.2d 711, 714 (3d Cir.1988); *United States v. Pritchard,* 745 F.2d 1112, 1118 (7th Cir.1984); *cf. Hale v. Fish,* 899 F.2d 390, 401 (5th Cir.1990) (applying *Franks* test to officer who did not sign or draft affidavit but whose presence at time of warrant tended to influence judge issuing warrant).

We agree with the reasoning of these circuit courts that a deliberate or reckless misstatement may form the basis for a *Franks* claim against a government official who is not the affiant. "The Fourth Amendment places restrictions and qualifications on the actions of the government generally, not merely on affiants." *DeLeon,* 979 F.2d at 764. A governmental official violates the Fourth Amendment when he deliberately or recklessly provides false, material information for use in an affidavit in support of a search warrant, regardless of whether he signs the affidavit.

Although Starnes did not sign the affidavit and was not present when O'Brien requested the warrant from the magistrate, Starnes helped to draft the affidavit and

admits he was the exclusive source of the inaccurate information about Peggy Hart's marital status. Hart alleges that Starnes provided the false information intentionally or recklessly. Therefore, Hart has stated a claim for violation of her Fourth Amendment rights under *Siegert*.

The issue, then, becomes whether Starnes can demonstrate that he did not violate any of Hart's clearly established Fourth Amendment rights. Hart's arrest would violate the Fourth Amendment if Starnes intentionally or recklessly included false information in the affidavit and this information was necessary for probable cause. Starnes provided the inaccurate information in the affidavit about Hart being married to Stanley Hart, and he realized that this information was incorrect the day of the raid. However, there is no evidence that Starnes knew the information was inaccurate before giving it to O'Brien to include in the affidavit.[12] Therefore, there is no genuine issue that he intentionally provided false information for inclusion in the affidavit.

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[12] Starnes later testified that Stanley Hart told him sometime prior to the raid that he had been a marijuana cultivator but had since stopped. Starnes also testified that, sometime prior to the raid, the Peggy Hart married to Stanley Hart informed him that Stanley had become a drug counselor. However, the fact that Starnes had reason to believe that Stanley Hart had stopped growing marijuana does not impugn the truthfulness of his statement that Stanley Hart is someone known to have cultivated marijuana, nor would it have established doubt in Starnes's mind that the Peggy Hart married to Stanley Hart was not the Peggy Hart who owned the vehicles parked on or near Conine's property.

The question remains whether Starnes exhibited a reckless disregard for the truth in providing the information. *Franks*, 438 U.S. at 171, 98 S.Ct. at 2684. To prove reckless disregard for the truth, Hart must present evidence that Starnes "in fact entertained serious doubts as to the truth" of the statement that she was the Peggy Hart married to Stanley Hart. *St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968) (setting forth standard for reckless disregard of truth in libel cases); *see also United States v. Williams*, 737 F.2d 594, 602 (7th Cir.1984), *cert. denied*, 470 U.S. 1003, 105 S.Ct. 1354, 1355, 84 L.Ed.2d 377 (1985) (adopting First Amendment standard for recklessness in *Franks* context); *United States v. Tomblin*, 46 F.3d 1369, 1388 (5th Cir.1995) (citing recklessness standard in *Williams* with approval). There is some evidence in the record that Starnes knew the other Peggy Hart, who worked at the Lamar County courthouse. However, there is no evidence that Starnes had any reason to believe that there might be two Peggy Harts within this rural community so as to raise serious doubts as to the accuracy of his statements to O'Brien.

Perhaps there are steps Starnes might have taken to verify the information he provided, however, the summary judgment record does not disclose what these might be, nor that they would actually show the information to be inaccurate. Starnes is entitled to qualified immunity on Hart's first claim.

2

Hart also claims that Starnes violated her constitutional rights by failing to act at the arrest scene once he

had seen her and realized that some of the information supporting the warrant was inaccurate. Starnes has admitted that he knew shortly before Hart was arrested that the statement in the affidavit about Hart being married to a known marijuana cultivator was incorrect, but that he did not so inform the officers. Hart alleges that Starnes had a duty to inform the police officers that the arrest warrant was based on inaccurate information and a duty to stop execution of the warrant.

Even assuming such a duty exists, however, Starnes did not violate any of Hart's clearly established Fourth Amendment rights at the time of her arrest. Law enforcement officers may have a duty to discontinue an arrest upon discovery that information contained in a warrant is incorrect if it is material. *Cf. Maryland v. Garrison*, 480 U.S. 79, 87, 107 S.Ct. 1013, 1018, 94 L.Ed.2d 72 (1987) (once officers were on notice of a risk that apartment they were searching was erroneously included within terms of warrant, they were required to withdraw and discontinue search); *United States v. Marin-Buitrago*, 734 F.2d 889, 894 (2d Cir.1984) (when definite and material change has occurred in facts underlying magistrate's determination of probable cause, officers must report new and correcting information to magistrate before acting on warrant). However, we can find no controlling case law that establishes a constitutional duty on a prosecutor tagging along on a search to inform law enforcement officers of his doubts that the warrant should be executed as written. Therefore, under *Harlow*, Starnes is qualifiedly immune against Hart's failure-to-inform allegation.

VII

Next, O'Brien and Montana argue that the district court erred in determining that they did not have official immunity against Hart's state-law claims. Starnes, Motley, and Myrick did *not* assert official immunity defenses to Hart's state law claims; therefore we consider the defenses only as to O'Brien and Montana. The state-law claims include false imprisonment, malicious prosecution, and intentional infliction of emotional distress.[13] We review district court determinations of state law *de novo*. *Salve Regina College v. Russell*, 499 U.S. 225, 231, 111 S.Ct. 1217, 1221, 113 L.Ed.2d 190 (1991).

The Texas Supreme Court has stated that government employees are entitled to official immunity from suit arising from performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority. *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex.1994). Official immunity in Texas is substantially the same as qualified immunity under federal law. *Id.* at 656. One important difference, however, is that official immunity does not incorporate the requirement that the plaintiff show the violation of a clearly established right. Rather, official immunity hinges on whether the official's activities were undertaken in "good

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[13] The district court also denied the officials summary judgment on the ground that triable issues of fact remained regarding certain elements of the torts. Although the officials challenge that decision and both sides have briefed the issues, we may not entertain these arguments in the instant interlocutory appeal. *Johnson v. Jones*, 515 U.S. 304, 314, 115 S.Ct. 2151, 2156, 132 L.Ed.2d 238 (1995).

faith," that is, whether they were objectively reasonable. *Id.* at 656-67.

The district court determined that the officers were acting within the scope of their authority, but that fact issues remained as to whether they were exercising their duties in good faith. The district court also apparently assumed that the officers were all exercising discretionary duties, and Hart does not argue otherwise in this appeal. We consider each of Hart's state-law causes of action in turn, examining the officers' good faith in each.

A

Hart maintains that, under Texas law, O'Brien and Montana are liable for falsely imprisoning her. She alleges that O'Brien instructed Myrick to arrest her, coordinated the federal hold, and did nothing to prevent her two-week detention. She further avers that Montana is liable for making the final decision to arrest her and for discussing the federal hold with the others.

To establish false imprisonment, Hart must prove that O'Brien, and Montana willfully detained her without her consent and without authority of law. *James v. Brown,* 637 S.W.2d 914, 918 (Tex.1982). As a general matter, liability extends to anyone who participates in the unlawful detention or who directs or requests the detention. *Cronen v. Nix,* 611 S.W.2d 651, 653 (Tex.Civ.App.1980, writ ref'd n.r.e.), *cert. denied,* 454 U.S. 833, 102 S.Ct. 132, 70 L.Ed.2d 112 (1981). However, "[i]f an arrest or detention is executed under process which is legally sufficient in form and duly issued by a court of competent jurisdiction, an action for false imprisonment will not lie." *Id.* There is no

dispute that the warrant was facially valid and was issued by a court with competent jurisdiction. Therefore, Hart cannot charge the officers who executed the warrant with false imprisonment. *See Emerson v. Borland*, 927 S.W.2d 709, 720 (Tex.App.1996, writ denied) (plaintiff arrested pursuant to facially valid warrant and imprisoned for five days could not allege false imprisonment on the basis that probable cause did not exist to issue warrant).

In short, because the officers were acting pursuant to a facially valid warrant, they could reasonably entertain a good faith belief that their execution of the warrant was consistent with Hart's rights. *See Cantu*, 77 F.3d at 810 (when allegations fail to state a claim as a matter of state law, officer is entitled to immunity). Therefore the officers enjoy official immunity against this allegation.

B

By contrast, the issuance of a valid warrant will not shield the officers from liability for malicious prosecution; indeed it is conformity to valid process that separates the two causes of action. As the Texas Supreme Court established long ago, arrests *without* authority may be remedied by a claim for false imprisonment, but any alleged wrongs committed by officers pursuant to lawful process must be vindicated under a theory of malicious prosecution. *Hubbard v. Lord*, 59 Tex. 384, 386 (Tex.1883) ("Where the arrest is without authority, . . . , [the court] may proceed here as upon the same allegations and against the same parties as at common law in the action of false imprisonment. Where the arrest is made under

lawful process, we must proceed alone against the party who sued it out, and must allege malice and want of probable cause.").

Hart asserts that O'Brien is liable for malicious prosecution for including the two inaccurate statements in the affidavit of probable cause, and that both officers are liable for the decision to arrest her, for instigating the "federal hold," and for their failure to provide exculpatory information to Starnes.

To prove malicious prosecution, a plaintiff must show: (1) the commencement of a criminal prosecution against the plaintiff; (2) causation (initiation or procurement) of the action by the defendant; (3) termination of the prosecution in the plaintiff's favor; (4) the plaintiff's innocence; (5) the absence of probable cause for the proceedings; (6) malice in filing the charge; and (7) damage to the plaintiff. *Richey v. Brookshire Grocery Co.*, ___ S.W.2d ___, ___, No. 95-0692, 1997 WL 378134 at *2 (Tex. July 9, 1997).

The district court denied O'Brien and Montana summary judgment on official immunity, holding that, because issues of fact remained contested, it could not decide the issue on summary judgment. Just as in the context of false imprisonment, if Hart fails to state a claim for malicious prosecution, O'Brien and Montana are necessarily entitled to official immunity under Texas law, because the officers could reasonably believe that their actions were consistent with Hart's rights. *Cantu*, 77 F.3d at 810.

The inclusion of inaccurate statements in a warrant for probable cause and the failure to produce exculpatory

evidence do not state a claim for malicious prosecution under state law. As we held in the qualified immunity analysis, O'Brien did not include the inaccurate statements intentionally or recklessly, and therefore as a matter of law, Hart cannot show malice as required. Furthermore, consistent with this analysis, we find that O'Brien was acting in good faith, affording him official immunity. Moreover, as we also discussed in the qualified immunity section of this opinion, the officers reasonably believed they had probable cause to detain Hart, and her assertions that the officers should have informed Starnes that they did not have probable cause do not constitute exculpatory information.

O'Brien and Montana similarly are officially immune for the decision to arrest Hart, because Hart has not shown the absence of probable cause. "The probable-cause determination asks whether a reasonable person would believe that a crime had been committed given the facts as the complainant honestly and reasonably believed them to be before the criminal proceedings were instituted." *Richey*, ___ S.W.2d at ___, 1997 WL 378134 at *2; *see also Akin v. Dahl*, 661 S.W.2d 917, 921 (Tex.1983) (same), *cert. denied*, 466 U.S. 938, 104 S.Ct. 1911, 80 L.Ed.2d 460 (1984). We have held in our analysis of the officers' federal qualified immunity that the officers reasonably believed they had probable cause to proceed against Hart. Therefore Hart cannot assert a claim for malicious prosecution against them for their decision to arrest her.

Hart's further assertion, that the officers are liable under a malicious prosecution theory for placing her on federal hold, and therefore denying her bail, is similarly

unavailing. Bail is simply the security given by an accused to ensure that she will appear in court and answer the accusation brought against her. Tex.Crim. Pro. Ann. Art. 17.01. Recommending the denial of bail does not "continue" judicial proceedings; such proceedings persist regardless of whether the court grants or denies a defendant bail. Furthermore, we note that the magistrate set bail at $50,000 the day after the federal hold, and Hart could not post this amount for about two weeks. Thus, the federal hold cannot even be said to have prolonged her detention. On this claim she both has failed to show commencement or continuation of proceedings caused by the officers' actions, and has failed to show damages. Therefore O'Brien and Montana are entitled to official immunity for malicious prosecution as a matter of law.

C

Hart alleges that O'Brien and Montana intentionally inflicted emotional distress on her.[14] Under Texas law, intentional infliction of emotional distress has four elements: (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the

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[14] The district court granted Myrick summary judgment on the merits for Hart's intentional infliction claim, and that ruling is not on appeal here. Although Motley, Myrick, and Starnes alluded to a defense of official immunity in their motion for summary judgment on Hart's intentional infliction claim, the district court did not rule on the motion and none of the three raises the defense on appeal. Motley, Myrick, and Starnes did not assert official immunity defenses to either of the other state law claims, either before the district court or on appeal.

defendant's actions caused the plaintiff emotional distress; and (4) the emotional distress suffered by the plaintiff was severe. *Mattix-Hill v. Reck*, 923 S.W.2d 596, 597 (Tex.1996). A court should find liability for outrageous conduct "only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex.1993) (citation and internal quotation marks omitted). "Liability does not extend to mere insults, indignities, threats, annoyances, or petty oppressions." *Ugalde v. W.A. McKenzie Asphalt Co.*, 990 F.2d 239, 243 (5th Cir.1993) (applying Texas law) (internal quotation marks omitted). Moreover, to recover damages for this tort, the emotional distress the defendant inflicts must be unreasonable under the circumstances and "so severe that no reasonable man could be expected to endure it." *Motsenbocker v. Potts*, 863 S.W.2d 126, 132 (Tex.App.1993, no writ).

Hart's allegations that O'Brien and Montana's decisions to arrest her intentionally inflicted emotional distress do not state a claim because the warrant commanded them to arrest her. Conduct that is required or authorized by law cannot be extreme or outrageous. *Reck v. Londow*, 926 S.W.2d 589, 593 (Tex.App.1995), *judgm't rev'd in part on other grounds*, 923 S.W.2d 596 (Tex.1996). Therefore Hart fails to state a claim on this count, and the officers are officially immune from suit for deciding to arrest Hart. *Cantu*, 77 F.3d at 810.

Moreover, Hart fails to state a claim against O'Brien and Montana with regard to the federal hold. The hold lasted only one day, and Hart remained in detention for

two weeks after the hold was lifted because she could not meet bail, which had been set at $50,000. Thus, at most, any distress caused by the hold (as opposed to her arrest or pretrial detention) would have stemmed from her loss of *opportunity* to post bail a day earlier or, alternatively, from the possible involvement of federal (as opposed to state) officials in her case. We determine, as a matter of law, that such alleged distress is not severe. Thus, O'Brien and Montana enjoy official immunity from Hart's claim regarding the federal hold.

Finally, we hold that Hart may not state a claim for intentional infliction of emotional distress based on her allegations that O'Brien and Montana arranged for her arrest without probable cause. To state a claim for intentional infliction of emotional distress, the plaintiff must show that the defendant acted intentionally or recklessly. As we have established, there is no genuine issue suggesting that the officers did not reasonably believe they had probable cause to seek a warrant from the magistrate judge, or that they acted unreasonably in executing the warrant. Therefore, Hart fails to state a claim that the officers intentionally inflicted emotional distress, and the officers are officially immune on this score as well. *See also Halbert v. City of Sherman, Tex.*, 33 F.3d 526, 529 (5th Cir.1994) (holding that even falsely informing police that someone is using drugs is not sufficiently outrageous conduct to warrant recovery of damages for intentional infliction of emotional distress).

Therefore we find that the officers are officially immune from suit under any theory of intentional infliction of emotional distress.

VIII

This is a complex, multiple-defendant, multiple-theory case. We briefly summarize the state of the claims for the sake of clarity. Hart sued the defendants under five theories: two federal claims that the arrest and search were a violation of her constitutional rights, and three state claims for false imprisonment, malicious prosecution, and intentional infliction of emotional distress. First, as to Hart's federal section 1983 claims: the district court granted summary judgment to Myrick and Red River County on both federal claims. We have dismissed all the remaining federal claims, against all defendants, on grounds of qualified immunity (and absolute immunity for some of Starnes's actions). Next, as to her state claims, the district court granted summary judgment to Red River County on all claims, and to Myrick on the intentional infliction count. In addition, we have held that O'Brien and Montana are entitled to official immunity for all three claims.

Therefore, Hart has live causes of action in state law only, asserting false imprisonment against Motley, Myrick, and Starnes; asserting malicious prosecution against Motley and Starnes (Hart did not sue Myrick on this theory); and asserting intentional infliction against Motley and Starnes.

IX

This case illustrates the difference, as a matter of law, between simple negligence and recklessness. The officials in this case certainly made mistakes, but we conclude that there is no issue of material fact demonstrating that they

acted intentionally or recklessly. *See Malley*, 475 U.S. at 341, 106 S.Ct. at 1096 (Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law."). Starnes did not slander Hart, but provided seemingly reliable (although ultimately erroneous) information from Drug Task Force files. Even though the evidence connecting Hart to the crime was thin, the officers reasonably could have believed that they had enough to establish probable cause. In addition, they did exactly what they were supposed to do with the information: they took their evidence to a magistrate judge, who held that they had probable cause for arrest. The officers conducted searches and arrests only where they had a valid warrant.

Qualified and official immunities protect police officers in the "gray area" between absolute certainty on the one hand and reckless or wanton conduct on the other. In the regular course of police work, this gray area can cover a wide range of reasonable conduct. Viewed *ex post*, it is easy to criticize some of the officers' actions; however, for purposes of immunity, we must evaluate their actions given what they knew when they acted. At the very least, we think that the officers and Starnes did not act recklessly in this case.

We REVERSE the district court's judgments on absolute immunity as to Starnes, REVERSE the district court's holdings on qualified immunity as to all defendants, and REVERSE the district court's holdings on official immunity as to O'Brien and Montana. We RENDER summary judgment in favor of O'Brien and Montana on all counts, and in favor of Motley and Starnes on Hart's federal claims.

BENAVIDES, Circuit Judge, concurring in part and dissenting in part:

I join the portions of the majority's opinion that are not derived from a finding that the warrant issued for Hart's arrest and the search of her property was substantively valid. As a result, I join parts IV and V of the majority's opinion, which resolve the evidence admissibility and absolute immunity issues presented in this appeal. Moreover, because Motley was not involved in the surveillance of Conine's property nor the preparation of the warrant application, I join the majority's holding that he is entitled to qualified immunity because of his reliance on a seemingly facially valid warrant. Further, because I agree with the majority's finding that Hart failed to show that the placement of the false federal hold on her criminal complaint caused her to be detained in violation of the Fourth Amendment and maliciously prosecuted, I join the discrete portions of its opinion holding that O'Brien, Montana, and Motley were entitled to summary judgment on these claims.

I write separately, however, because I cannot agree with the majority's assertion of jurisdiction over the portions of the interlocutory appeals of defendants O'Brien, Montana, and Starnes challenging the district court's determination that Hart's evidence raised a genuine issue of material fact regarding the validity of the warrant. This sufficiency of the evidence finding is not immediately appealable under the collateral order doctrine because it does not conclusively determine a claim of right that is separable from the Fourth Amendment rights asserted in Hart's action. *See Mitchell v. Forsyth*, 472 U.S. 511, 524, 105 S.Ct. 2806, 2814, 86 L.Ed.2d 411 (1985) (quoting *Cohen v.*

Beneficial Indus. Loan Corp., 337 U.S. 541, 546, 69 S.Ct. 1221, 1225, 93 L.Ed. 1528 (1949)). The majority's analysis of the immunity[15] claims of these three defendants, moreover, is entirely predicated on its initial and extra-jurisdictional finding that O'Brien and Starnes did not violate Hart's Fourth Amendment rights by knowingly or recklessly including false statements in the probable cause affidavit. Because the majority acknowledges that the existence of immunity for O'Brien, Montana, and Starnes is conditioned on this finding, I dissent from the portions of its opinion holding that these three defendants are entitled to immunity as a matter of law.

In her complaint, Hart asserted that O'Brien and Starnes violated her Fourth Amendment rights, in part because they intentionally or recklessly included false statements in the probable cause affidavit submitted in support of the warrant for her arrest and the search of her residence. After discovery, O'Brien, Montana, and Starnes moved for summary judgment. They argued that each of Hart's claims was dependent on a finding that the warrant was invalid and that she did not produce sufficient evidence to raise a genuine issue of material fact as to whether these false statements were intentionally or recklessly included in the affidavit. In addition, they asserted that they were entitled to immunity. The district court denied these motions and explicitly found that "the plaintiff has raised a genuine issue of material fact as to

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[15] Because the standards for immunity under federal and Texas law are quite similar, I will simply use the term "immunity" to refer to "qualified immunity" under federal law and "official immunity" under Texas law.

whether these two false statements were included knowingly or with reckless disregard for their truth and veracity."

In its statement of jurisdiction, the majority appears to recognize that this finding may not be reviewed on interlocutory appeal, for it correctly notes that when a "district court denies summary judgment on the grounds that material facts exist which a party may or may not be able to prove at trial, the official must await final judgment before appealing." *Maj. op.* at 12; *Behrens v. Pelletier*, ___ U.S. ___, ___, 116 S.Ct. 834, 842, 133 L.Ed.2d 773 (1996); *Johnson v. Jones*, 515 U.S. 304, 305, 115 S.Ct. 2151, 2153, 132 L.Ed.2d 238 (1995). A public official who attacks a plaintiff's ability to prove her case is not raising a qualified immunity defense, which is "conceptually distinct from the merits of the plaintiff's claim.' " *Jones*, 515 U.S. at 314, 115 S.Ct. at 2157 (quoting *Mitchell*, 472 U.S. at 527, 105 S.Ct. at 2816). Instead, that official is arguing that "the evidence [cannot] support a finding that particular conduct occurred," and this argument "is not truly 'separable' from the plaintiff's claim." *Behrens*, ___ U.S. at ___, 116 S.Ct. at 842. A court of appeals, therefore, may not review a sufficiency determination on interlocutory appeal because "there is no 'final decision' under [the collateral order doctrine as defined by] Cohen and Mitchell." *Id.; Jones*, 515 U.S. at 314, 115 S.Ct. at 2157.

The majority, however, begins its qualified immunity analysis by "consider[ing] whether O'Brien's sworn statement that Hart lived in Conine's trailer was knowingly false or reckless," and "whether Starnes exhibited a reckless disregard for the truth in providing the [false] information" regarding Hart's marital status. *Maj. op.* at 570,

578. Further, after thoroughly reviewing the record below, the majority disagrees with the district court's view of the conflicting evidence and concludes that O'Brien and Starnes did not intentionally or recklessly include the false statements in the probable cause affidavit. There can be no question that the majority's finding that the summary judgment evidence fails to create a genuine issue of material fact is improper and extra-jurisdictional under the Court's decisions in *Johnson* and *Behrens*.

In order to review immediately the appeals of O'Brien, Montana, and Starnes insofar as they challenge the district court's finding of a genuine issue of material fact, the majority appears to create a new principle of interlocutory jurisdiction. Under this principle, a court of appeals may exercise interlocutory jurisdiction over a district court's finding of a genuine issue of material fact if any of the evidence relating to that finding is undisputed. *Maj. op.* at 563 (stating that "enough uncontested facts exist to determine that [these three defendants] are immune as a matter of law"), 569-72 (minimizing Hart's favorable evidence and independently reviewing the "undisputed facts" relating to the district court's determination that a genuine issue of material fact existed regarding O'Brien's *mens rea* when he included the false statements in the affidavit), 577-78 (understating Hart's favorable evidence and independently reviewing the evidence relating to Starnes' state of mind when he provided O'Brien with the information about Hart). The majority's indiscriminate reliance on the existence of undisputed evidence to justify its exercise of interlocutory jurisdiction, however, violates the collateral order doctrine.

Under the collateral order doctrine, a defendant may argue on interlocutory appeal that even if the disputed facts are viewed in the plaintiff's favor, the remaining undisputed facts demonstrate that the plaintiff's constitutional rights were not violated or that the defendant's conduct was objectively reasonable in light of clearly established law. *Behrens*, ___ U.S. at ___, 116 S.Ct. at 842; *Naylor v. Louisiana*, 123 F.3d 855, 856 (5th Cir.1997); *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir.1997).[16] This is because the question for interlocutory review – the existence of immunity – is a purely legal question that is separable from the merits of a plaintiff's claim. *Jones*, 515 U.S. at 314, 115 S.Ct. at 2157. The majority, however, relies on the presence of undisputed facts to justify its interlocutory review of Hart's compliance with her burden of production, an issue that the Supreme

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[16] In this case, however, there was no evidence in the probable cause affidavit, aside from the false statements, linking Hart to any crime. Thus, O'Brien, Montana, and Starnes cannot argue on interlocutory appeal that the undisputed facts show that Hart's Fourth Amendment rights were not violated because the affidavit's remaining content revealed the existence of probable cause. *See Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978). Further, the absence of such additional evidence explains why the majority must find that these false statements were properly included in the warrant application in order to find that the conduct of these three defendants was objectively reasonable. Of course, had the district court been presented with an affidavit containing both the false statements as well as other undisputed evidence allegedly providing probable cause, a finding that the undisputed facts did not establish probable cause nor justify a reasonable belief in its existence would have been reviewable on interlocutory appeal.

Court has found to be inextricably intertwined with, rather than separate from, the merits of her claims. *Id.* Thus, the existence of undisputed evidence pertaining to the district court's finding of a genuine issue of material fact does not transform that determination into one that is immediately appealable under the collateral order doctrine.

The majority, moreover, necessarily relies on its extra-jurisdictional conclusion that the false statements were properly included in the probable cause affidavit in order to award O'Brien, Montana, and Starnes immunity on the remainder of Hart's claims. To begin with, the majority finds that these statements provided probable cause for the arrest of Hart and the search of her residence. The presence of probable cause, moreover, disposes of several of Hart's Fourth Amendment and state law claims. Further, by including these statements within the probable cause affidavit, the majority transforms a warrant of questionable validity into a "facially valid" warrant, *maj. op.* at 576, 579-80, that can be relied on by the very people who may have intentionally or recklessly provided the issuing magistrate with false information. This then eliminates Hart's remaining Fourth Amendment and state law claims.[17] Thus, solely by virtue of its

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[17] This principle of immunity, however, cannot dispose of the claims against Montana. Montana, like O'Brien, participated in the surveillance of Conine and Hart that provided the factual basis for a finding of probable cause. Thus, because there is a factual dispute as to whether O'Brien, given his knowledge, intentionally or recklessly included false statements in the probable cause affidavit, it is an open question whether Montana, who possessed the same knowledge, could reasonably have relied on the warrant issued on the basis of this affidavit.

improper exercise of jurisdiction, the majority is able to immunize O'Brien, Montana, and Starnes with respect to each of Hart's claims before us on appeal.

For the foregoing reasons, I respectfully DISSENT from the portions of the majority's opinion holding that O'Brien, Montana, and Starnes are entitled to qualified immunity as a matter of law. I would instead dismiss for lack of jurisdiction the portions of the appeals of these three defendants challenging the district court's finding that Hart met her burden of production regarding the validity of the warrant under *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978).

APPENDIX B

OPINION ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC,

JULY 23, 1998

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-40151

PEGGY NELL HART

Plaintiff-Appellee

v.

HAROLD B O'BRIEN, DPS Officer; ET AL

Defendants

HAROLD B O'BRIEN, DPS Officer; FRANK MONTANA, DPS Officer; C T MYRICK, Law Enforcement Officer; CARL MOTLEY; JEFF STARNES, Assistant Lamar County Attorney

Defendants-Appellants

Appeals from the United States District Court
for the Eastern District of Texas, Tyler

(Filed Jul. 23, 1998)

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 11/6/97, 5 Cir., ___, ___ F.3d ___)

Before BARKSDALE, EMILIO M. GARZA and BENAVIDES, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED.R.APP.P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED.R.APP.P. and 5TH CIR. R. 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-4

FORTUNATO P. BENAVIDES, Circuit Judge, concurring in part and dissenting in part.

APPENDIX C

ORDER OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS

JANUARY 26, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
PARIS DIVISION

PEGGY NELL HART,	§	
Plaintiff,	§	
v.	§	**3:93 CV 62**
HAROLD O'BRIEN, FRANK MONTANA, JEFF STARNES, CARL MOTLEY, C.T. MYRICK, and RED RIVER COUNTY, TEXAS,	§	
Defendants.	§	

ORDER

(Filed Jan. 26, 1996)

I. Introduction

All defendants in the above-entitled and numbered civil action move for summary judgment. Defendants Harold O'Brien and Frank Montana join in one motion for summary judgment, and defendants C.T. Myrick, Carl Motley, Jeff Starnes, and Red River County, Texas, join in a separate summary judgment motion. The plaintiff has filed a single, consolidated response. Because both motions raise substantially the same grounds for relief, both will be treated together in this order.[1]

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[1] Defendants O'Brien and Montana have also moved to strike portions of the plaintiff's summary judgment evidence. Because the disposition of their motion does not turn in any way on consideration of the disputed evidence, the motion to strike is denied as moot.

II. Background and Summary Judgment Evidence

During a drug eradication program conducted in the summer of 1992, law enforcement officers discovered a marihuana field in a rural area of Red River County, Texas. The prime suspect was David Conine, who lived in a mobile home near the fields and who had been arrested in 1985 for growing marihuana in the same area. The plaintiff, Peggy Nell Hart, lived in a white frame house with black trim on a tract of land adjacent to Conine's. Officers conducted surveillance of Conine from August 12, 1992, through August 24, 1992, and, allegedly, observed Hart at Conine's residence on a number of occasions. As a result of the investigation, law enforcement officers obtained a warrant and searched both Conine's and Hart's homes. While drug-related paraphernalia was found in Conine's home, no incriminating evidence was found at Hart's residence. Both Conine and Hart were arrested. Conine ultimately pleaded guilty in federal court to one count of possession of marihuana with the intent to distribute, in violation of 21 U.S.C. § 841(a)(1), and received a sentence of four years confinement. While Hart was initially charged with drug-related offenses, the charges against her were ultimately dropped.

Hart filed this action against the government officials involved in the investigation, the search, and the arrest. The facts underlying this action are complex, and many of the salient issues are in dispute. An extended recitation of the circumstances surrounding Hart's arrest, emphasizing the points on which the parties agree and those on

which they disagree, is therefore necessary for the discussion of the legal issues that follows.

The warrant that was issued contains several facial ambiguities. First, the warrant is entitled only "Search Warrant," but the text of the warrant authorizes, in addition to a search, the arrest of persons identified in the affidavit. *See Plaintiff's Exhibit No. 10, Search Warrant and Accompanying Exhibits* (describing Conine and Hart as suspects). Second, the warrant's description of the area to be searched is sometimes limited to Conine's tract of land, but other times implies that Hart's residence is intended to be searched as well. The first paragraph of the warrant, for instance, describes only Conine's tract of land, and refers to an attached exhibit describing the metes and bounds of only Conine's property. A description of Hart's home, however, is included in a list of buildings subject to search, and a hand-drawn map, which is attached as an exhibit to the warrant, depicts Hart's home as part of the area to be searched. The parties draw different conclusions from the warrant's internal inconsistencies. The defendants contend that the warrant authorized the search of Conine's and Hart's property, as well as their arrest. Hart contends that the warrant authorized only a search, and a search of only Conine's property.

Hart further asserts that the information included in the warrant application regarding Hart was false and that the officers did not have probable cause to obtain a warrant to search her property or to arrest her. Defendant O'Brien, a sergeant with the Texas Department of Public

Safety, signed the affidavit supporting the warrant application, and defendant Starnes, an assistant county attorney for both Lamar and Red River Counties, assisted in its preparation. The application and supporting affidavit focus almost exclusively on the illegal activities of David Conine, but do include some information on Hart. In particular, O'Brien makes the following assertion:

> During the almost continuous surveillance on Conine's property, affiant observed Conine enter and leave the property on numerous occasions. On several of those occasions, Conine and/or an unknown, white female with light brown hair who is residing at the mobile home, has stopped by the white frame house with black trim shutters, entered the residence and returned a short time later. The unknown, white female has been seen by Affiant driving a blue Buick, registered to a Peggy Hart. Peggy Hart is married to Stanley Hart, who according to [Drug Task Force] files, is a known marihuana cultivator in Red River County, Texas

Plaintiff's Exhibit No. 10, Affidavit of Harold O'Brien, ¶ 12. The information in this paragraph is largely inaccurate. First, Hart has never resided with Conine at the mobile home, but was his neighbor, living in the white frame house with black trim on an adjacent tract of land. Second, the plaintiff has never been married to Stanley Hart: While Stanley Hart is married to a woman named Peggy Hart, it is a different Peggy Hart from the plaintiff. The parties dispute how these two pieces of erroneous information made their way into the affidavit.

O'Brien contends that he had probable cause to believe that Peggy Hart (the plaintiff) was residing with

Conine, and probable cause to believe that Hart was aware of Conine's drug activities. O'Brien bases this conclusion on the following observations made during the surveillance of Conine in the middle of August 1992:

> (1) Conine and Hart got out of a car together, had it was apparent from their luggage that they had been out of town for the night.
>
> (2) Hart rode with Conine to a dump site on Conine's property at which a number of marihuana plants were growing.
>
> (3) Hart was present at Conine's when an associate of Conine's, a marihuana dealer, arrived at the mobile home.
>
> (4) Hart stayed overnight at Conine's home on several occasions.
>
> (5) Hart travelled to Paris, Texas, with Conine to pay her electric bill.
>
> (6) Hart cooked for Conine on several occasions.
>
> (7) Conine urinated in his yard in the presence of Hart.
>
> (8) Hart accompanied Conine on a "heat run," whereby Conine drove his car in an erratic manner – pulling over to the side of the road, making frequent u-turns – in order to ascertain whether he was being followed.
>
> (9) Hart was frequently in a barn adjacent to Conine's mobile home.

Deposition of Harold O'Brien, at 85-94. None of these incidents are mentioned in the application for the warrant.

Hart denies that some of these incidents ever occurred, disputes the significance of the rest, and alleges that O'Brien knew, or should have known, that she was not living with Conine at the time O'Brien prepared the affidavit. She maintains that she was a close friend of Conine's, but has never been romantically involved with him. She went to Conine's residence on a regular basis because she performed odd jobs for him, and also because her horse was penned in the barn adjacent to Conine's mobile home. *Id.* at 19. Although she spent the night at his home on several occasions while he was recovering from heart problems, *id.* at 63, she never lived with Conine and never had any awareness of the illegal activities taking place on his property.

Responding to the specific incidents relied on by O'Brien, Hart asserts that she did not accompany Conine to the dump site, but rather held the gate open for Conine as he drove to the dump by himself. Further, she represents that she has never been to the dump site, and thus had no opportunity to see the marihuana plants growing there. *Id.* at 104. Conine corroborates this claim. *See Deposition of David Conine,* at 41. Hart denies that Conine ever urinated in her presence, *Deposition of Peggy Nell Hart,* at 70, and Conine also denies that this incident ever took place. *Deposition of David Conine,* at 50. She further denies accompanying Conine on a "heat run." *Deposition of Peggy Nell Hart,* at 95. O'Brien's own notes, taken during his investigation, support Hart's version of events on this point. *See Deposition of Harold O'Brien,* at 112 ("Conine leaves property and goes to Clarksville, Texas Piggly Wiggly store and returns home. No information on Hart at this time."). She admits accompanying Conine on an

overnight trip to a Louisiana horse-racing facility, *Deposition of Peggy Nell Hart*, at 63; travelling to Paris, Texas, with Conine to pay their respective utility bills, *id.* at 94; and cooking a meal at Conine's house on occasion, *Id.* at 76.

As for the erroneous statement that Hart was married to Stanley Hart, O'Brien, who signed the affidavit, received the information from defendant Starnes, an assistant county attorney assisting with the investigation. *Deposition of Harold O'Brien*, at 79; *Deposition of Jeff Starnes*, at 41. The plaintiff asserts that Starnes knew, at the time the affidavit was prepared, that the woman living next to Conine was not the Peggy Hart married to Stanley Hart. In support, the plaintiff offers the affidavit of the Peggy Hart married to Stanley Hart, who states that she knew Starnes in 1992. *Plaintiff's Exhibit No. 11.* Starnes admits that he met the Peggy Hart married to Stanley Hart in May 1992, prior to the preparation of the affidavit, *Deposition of Jeff Starnes*, at 25, but contends that he did not realize, until the day of the search and arrest, that the plaintiff and the Peggy Hart married to Stanley Hart were two different people. He realized the error in the affidavit when he saw the plaintiff in her yard just prior to the execution of the warrant, but he did nothing to stop the search and subsequent arrest of the plaintiff. *Id.* at 39-41.

After her arrest, Hart was placed in the Lamar County jail. She was arraigned on a charge of possession of marihuana with intent to deliver, and she was denied bail. The defendants argue that she was denied bail simply because the investigation was still ongoing, and in support of this contention, offer the affidavit of the justice

of the peace presiding at the arraignment. *Defendants' Exhibit C, Affidavit of J.B. Holley,* Dec. 7, 1995, at 1. The plaintiff, on the other hand, contends that her bail was denied because Motley, then-chief deputy sheriff of Red River County, falsely told the justice of the peace that a "federal hold" had been placed on Hart's property. It is undisputed that the words "bail denied federal hold" appear on the criminal complaint signed by Motley, *Plaintiff's Exhibit No. 15; see also Defendant's Exhibit H,* and it is further undisputed that there is no such thing as a "federal hold."

The next day, August 26, 1992, the charges against Hart were changed to possession of a quantity of marihuana in an amount less than fifty pounds and more than five pounds, and bail was set at $50,000. Hart did not post bail immediately, but instead remained in jail until her bail was posted seventeen days later. The criminal charges against her were ultimately dropped for insufficient evidence. *Plaintiff's Exhibit No. 13.*

Hart's theory of events is essentially that the defendants knew she was not guilty of any illegal activity, but arrested her, filed criminal charges against her, and held her in jail without bail in order to pressure her into providing incriminating information against Conine. It is undisputed that Conine was the principal target of the investigation. Hart claims that when she was arrested, defendant Montana told her, "Your ass is in trouble, you better sing like a bird." Montana admits making a statement along those lines, albeit not in such crude terms. *Deposition of Frank Montana,* at 8; *see also Deposition of Carl Motley,* at 10 (corroborating Hart's claim). Further, Hart claims that defendant Motley, the officer who transported

her to jail and signed the initial criminal complaint against her, told her that he thought she was innocent. Motley does not recall making such a statement. *Deposition of Carl Motley,* at 12.

Hart brought this action against the defendants asserting a federal cause of action under 42 U.S.C. § 1983, for deprivation of her rights as secured by the Fourth Amendment. Hart also pleads pendent state-law claims of malicious prosecution, false imprisonment, and intentional infliction of emotional distress. Defendants Harold O'Brien and Frank Montana are officers with the Texas Department of Public Safety, and jointly supervised the surveillance and search of Conine's and Hart's property. In addition, O'Brien applied for the warrant, and Montana made the decision to arrest Hart. Defendants C.T. Myrick is a deputy sheriff for Red River County, Texas, and Carl Motley was, at all times relevant to this action, the chief deputy of Red River County. Myrick did not participate in the surveillance, but did participate in the search of Hart's property and her arrest. After the search, Motley took Hart to jail and signed the criminal complaint against her. Defendant Jeff Starnes is an assistant district attorney for Red River County and Lamar County, Texas. Starnes advised the law enforcement officials during the investigation, assisted O'Brien in the preparation of the warrant application, and was present at the execution of the warrant. In addition to suing the above defendants in their individual capacities, Hart names Red River County as a defendant. The plaintiff seeks actual damages in the amount of $400,000; punitive damages from O'Brien, Montana, and Starnes in their individual capacities; and attorneys' fees.

The defendants move for summary judgment on all claims. Red River County argues that it cannot be held liable for the alleged constitutional deprivations of its employees. All defendants challenge the ability of the plaintiff to establish certain elements of the state-law claims. Finally, the individual defendants argue that they are entitled to immunity, whether absolute or qualified, for all claims, whether federal or state.

III. Legal Standard

Summary judgment is proper under Fed. R. Civ. P. 56(c), "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The substantive law underlying the claims in issue identifies which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When assessing a motion for summary judgment, the court must make all factual inferences in favor of the party opposing the motion. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Hansen v. Continental Ins. Co.*, 940 F.2d 971, 975 (5th Cir. 1991). Often, summary judgment allows the court to dispose entirely of one or more claims within the case. However, a court may also grant partial summary judgment by identifying any undisputed issues of material fact. Such facts are then deemed established for trial. Fed. R. Civ. P. 56(d); *see Belinsky v. Twentieth Restaurant, Inc.*, 207 F.Supp. 412 (S.D.N.Y. 1962).

IV. Federal Claims

A. Municipal Liability

Under § 1983, Red River County cannot be vicariously liable for the acts of its officials. Instead, it is liable only when an official custom or policy of the county itself has violated the plaintiff's rights. *See City of Canton v. Harris*, 489 U.S. 378, 385 (1989) ("[A] municipality can be found liable under § 1983 only where the municipality *itself* causes the constitutional violation at issue." (emphasis in original)) The United States Court of Appeals for the Fifth Circuit defines a custom or policy as follows:

> 1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policy-making authority; or
>
> 2. A persistent, widespread practice of city officials or employees, which, although not authorized by officially adopted or promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body had delegated policy-making authority.

Bennett v. City of Slidell, 735 F.2d 861, 862 (5th Cir. 1984) (en banc), *cert. denied*, 472 U.S. 1016 (1985). Red River County argues that the plaintiff has not shown the alleged deprivations in this action to be the result of an official custom or policy.

The plaintiff contends that because Myrick and Motley acted pursuant to Red River County's policies and procedures, *Deposition of Bobby D. Storey Depo.*, at 11, Red River County's official customs or policies therefore violated the plaintiff's rights. It is not enough, however, that the official was carrying out the customs and policies of the county at the time that the deprivation occurred; the plaintiff must show, in addition, that the custom or policy led the official to deprive her of her rights. *See Rhyne v. Henderson County*, 973 F.2d 386, 392 (5th Cir. 1992). Otherwise, the county would be held liable on a *respondeat superior* theory of liability, which is not applicable to § 1983. *Monell v. New York Dep't of Social Servs.*, 436 U.S. 658, 694-95 (1978).

In this case, Hart has not identified such a custom or policy. The officially adopted policies of Red River County indisputably do not authorize the deprivations of Fourth Amendment rights as alleged by Hart. *See Red River County Police and Sheriff's Manual, Defendants' Exhibit* M. Nor has Hart alleged that the violations she has suffered are so widespread as to rise to the level of an informally adopted custom. *See, Richardson v. Oldham*, 12 F.3d 1373, 1381-82 (5th Cir. 1994). Because it cannot be said that Red River County's customs or policies were the moving force behind the constitutional violations alleged by the plaintiff, the federal claims against Red River County must be dismissed.

B. Federal Immunity

1. Absolute Immunity

At all times relevant to this action, defendant Jeff Starnes worked as an assistant county attorney for Red River County, Texas and Lamar County, Texas. *Deposition of Jeff Starnes*, at 76. He argues that, as a prosecutor, he is entitled to absolute immunity from damages liability. Hart responds that because Starnes's activities were investigatory rather than prosecutorial, absolute immunity does not apply in this case.

Absolute immunity turns on "the nature of the function performed, not the identity of the. actor who performed it." *Forrester v. White*, 484 U.S. 219, 229 (1988). Activities outside the courtroom are included within the scope of absolute immunity, but only those activities that are fairly within the prosecutor's function as an advocate. *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976). "A prosecutor's administrative duties and those investigatory functions that do not relate to an advocate's preparation for the initiation of a prosecution or judicial proceeding are not entitled to absolute immunity." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2615 (1993). Furthermore, "the official seeking absolute immunity bears the burden of showing that such *immunity* is justified for the function in question." *Burns v. Reed*, 500 U.S. 478, 486 (1991). If absolute immunity does not apply, then the prosecutor may, like any executive officer, be entitled to qualified immunity. *See Buckley*, 113 S. Ct. at 2616.

The activities of Starnes at issue in this case were indisputably investigative and administrative His primary role was as a legal advisor to the officers conducting the investigation and executing the search, and "prosecutors are not entitled to absolute immunity for their actions in giving legal advice to the police." *Id.* at 2614. Furthermore, Hart seeks to hold Starnes liable for providing false information to obtain a warrant unsupported by probable cause, and "[a] prosecutor neither is, nor should consider himself to be, an advocate before he has probable cause to have anyone arrested." *Id.* at 2616. Starnes is therefore not entitled to absolute immunity, but he may still be entitled to qualified immunity.

2. Qualified Immunity

All of the individual defendants assert qualified immunity from damages under 42 U.S.C. § 1983. Such immunity is available if the officer's actions are objectively reasonable in light of the clearly established law at the time of those actions. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982); *see White v. Taylor,* 959 F.2d 539, 544 (5th Cir. 1992) ("If reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity."). In evaluating a claim for immunity, it must first be determined whether the plaintiff has asserted a violation of a constitutional right. *Siegert v. Gilley,* 111 S. Ct. 1789, 1793 (1991). Second, it must be ascertained whether the right was clearly established at the time of the defendants' actions. *Id.*

In this case, Hart has alleged that the defendants unlawfully searched her residence and arrested her without either a valid warrant or probable cause. These allegations state a cause of action, and satisfy the first step of the qualified-immunity analysis. *See Dennis v. Warren*, 779 F.2d 245, 247 (5th Cir. 1985) ("An individual's right to be free from . . . unlawful arrest and detention is a federally protected right, the violation of which may be grounds for a suit under section 1983.").

Evaluation of the second step turns on the scope and validity of the warrant. Because, the defendants argue, a valid warrant to search Hart's residence and to arrest Hart was duly issued by a judicial officer, the actions of the defendants must be objectively reasonable. The plaintiffs argue, however, that the warrant authorized only a search of Conine's residence, and not a search of Hart's home or her arrest. Alternatively, the plaintiffs contend that even if the warrant on its face authorized the search of Hart's home and her arrest, the warrant was not valid because the defendants knowingly made material misrepresentations in the warrant application, and without these misrepresentations, probable cause did not exist to issue the warrant. In resolving the qualified immunity claims, therefore, it must be determined, first, what the warrant authorized the defendants to do, and second, whether the warrant was valid.

As to the first question, it is found that the terms of the warrant, when read as a whole, *United States v. Beaumont*, 972 F.2d 553, 560 (5th Cir. 1992), authorized the search of Hart's home and her arrest. Although styled "Search Warrant," the text of the warrant plainly commands a law enforcement official to locate the suspects

described in the affidavit (including Hart) "and arrest them and bring them before" the court. *Plaintiff's Exhibit No. 10.* Furthermore, a fair reading of the warrant and its attachments suggests that Hart's residence is included within the scope of the area to be searched. It is clear that, on a simple reading of the warrant and its attachments, an officer would be justified in searching Hart's residence and arresting Hart.

Because of the plaintiff's allegations of misfeasance in the application process, however, it is not clear whether the warrant was valid. *See Franks v. Delaware,* 438 U.S. 154 (1978) (holding that a warrant, although valid on its face, may be invalid if material, false statements were intentionally or recklessly provided to the judicial officer). The defendants claim that even if the inaccurate statements regarding Hart are removed from the warrant, sufficient information remains to support probable cause. *See United States v. Cherry,* 50 F.3d 338, 341 (5th Cir. 1995) ("[A] search warrant is valid, even if it contains a misrepresentation, if after striking the misrepresentation, there remains sufficient content to support a finding of probable cause."); *see also Illinois v. Gates,* 462 U.S. 213, 239-40 (1983) (applying a totality-of-the-circumstances test to determine the validity of the warrant). It is found that if the statements challenged by the plaintiff are removed from the warrant, then the warrant does not provide probable cause to search Hart's home or to arrest her. The assertions that Hart resided with Conine and that Hart was married to a marihuana cultivator are the only pieces of information in the warrant application that link Hart to any crime, and the plaintiff has raised a genuine issue of material fact as to whether these two false statements

were included knowingly or with reckless disregard for their truth and veracity. Setting aside this information, it is true that the remaining portions of the affidavit provide ample probable cause to search Conine's property and to arrest him, but no basis remains for concluding that probable cause exists to search Hart's residence or to arrest her.

In light of the above findings, it can be said that defendant Myrick's actions were objectively reasonable, but it cannot be determined at this time whether the actions of the remaining defendants were objectively reasonable. Myrick did not participate in the surveillance or the application for the search warrant. Nothing in the summary judgment evidence indicates that he had any personal knowledge that the warrant might be unsupported by probable cause; rather, he executed the warrant, which was valid on its face, at the direction of his superiors. Thus, whether the warrant was valid or not, Myrick reasonably relied on the warrants' terms in executing an arguably unlawful search and seizure. *Cf. United States v. Leon*, 468 U.S. 897, 922-26 (1984) (holding that the exclusionary rule does not apply to evidence obtained by an officer acting in reasonable reliance on a search warrant, issued by a detached and neutral magistrate, but ultimately found to be invalid). It is found, therefore, that Myrick is entitled to qualified immunity.

With regard to O'Brien, Montana, Starnes, and Motley, however, the record as it now stands reveals many disputed issues of material fact relevant to their qualified-immunity claims. Until the question of the warrant's validity is resolved – and specifically the question of

whether the inaccurate information supporting the warrant was intentionally or recklessly submitted – it is not possible to determine this issue on summary judgment. It is alleged by the plaintiff, and denied by the defendant, that O'Brien and Starnes provided false information to obtain a warrant for Hart's arrest and the search of her home; that Montana ordered the arrest of Hart, knowing that probable cause did not exist; and that Motley participated in Hart's arrest and signed a criminal complaint against her, knowing Hart to be innocent. Under the plaintiff's theory of the facts, the defendants would not [sic] entitled to qualified immunity: No reasonable government official would think it lawful to intentionally include false information in an affidavit supporting a warrant application; or to arrest a person or search her home, knowing probable cause did not exist in order to pressure her into informing on another. *Franks v. Delaware*, 438 U.S. 154 (1978), is clearly established law on the subject, and the Fifth Circuit has denied qualified immunity to officers accused of similar conduct, *Hale v. Fish*, 899 F.2d 390, 401-02 (5th Cir. 1990).

If, however, the plaintiff fails to prove all or part of her allegations, then the defendants may be entitled to qualified immunity, or they may not be liable for any constitutional violation at all. Whether the actions of O'Brien, Montana, Starnes, and Motley were objectively reasonable "cannot be sorted out without settling on a coherent view of what happened in the first place." *Lampkin v. City of Nacogdoches*, 7 F.3d 430, 435 (5th Cir. 1993) (per curiam), *cert. denied*, 114 S. Ct. 1400 (1994); *see Johnston v. City of Houston*, 14 F.3d 1056, 1061 (5th Cir. 1994) (summary judgment not warranted when facts

underlying qualified immunity are in dispute). With regard to these defendants, therefore, summary judgment on the issue of qualified immunity is inappropriate.

V. State Claims

A. Malicious Prosecution

To succeed on a claim of malicious prosecution in Texas a plaintiff must establish the following elements:

(1) a criminal action was commenced against her;

(2) the prosecution was caused by the defendant or with his aid;

(3) the action terminated in the plaintiff's favor;

(4) the plaintiff was innocent;

(5) the defendant acted without probable cause;

(6) the defendant acted with malice;

(7) the criminal proceeding damaged the plaintiff.

Taylor v. Gregg, 36 F.3d 453, 455 (5th Cir. 1994); *Brown v. United States*, 653 F.2d 196, 198 (5th Cir. 1981), *cert. denied*, 456 U.S. 925 (1982).

O'Brien and Montana move for summary judgment on the grounds that the fact that the warrant was issued establishes, as a matter of law, that probable cause existed to arrest Hart and search her residence. As discussed in the context of qualified immunity, however, *supra* part IV(B)(2), a genuine issue of material fact exists as to whether the warrant was valid or whether the defendants

had probable cause to arrest the plaintiff and search her residence. Hart has offered evidence that material statements in O'Brien's affidavit – such as the assertion that she was married to a marihuana cultivator – were false. Furthermore, she has challenged the veracity of many of the observations O'Brien relied on in concluding that Hart resided with Conine. Whether the defendants acted with probable cause cannot be resolved through summary judgment.

Starnes and Motley move for summary judgment[2] on the grounds that (1) Starnes and Motley did not commence prosecution against Hart; (2) the criminal action was not terminated in Hart's favor; (3) Hart is not innocent; (4) probable cause existed for Hart's arrest; and (5) Starnes and Motley did not act with malice. It is found that summary judgment is not justified on any of these grounds.

First, Starnes and Motley did participate in the prosecution of Hart. Starnes was involved in the investigation leading to Hart's arrest, and he allegedly provided O'Brien with information to obtain a warrant. Motley indisputably signed the criminal complaint against Hart. *Deposition of Carl Motley,* at 3; *Plaintiff's Exhibit No. 15.* Second, it cannot be denied that the criminal action was terminated in Hart's favor: Starnes himself recommended

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[2] While Myrick and Red River County also move for summary judgment on this claim, the Second Amended Complaint names only O'Brien, Montana, Starnes, and Motley as defendants for this particular cause of action. Thus, it would appear that Myrick and Red River County have no need to move for summary judgment.

dismissal of the charges for lack of evidence. *Plaintiff's Exhibit No. 13.* Third, the defendants have produced no evidence that Hart is guilty of any crime. Fourth, as discussed in more detail above, many genuine issues of material fact surround the existence or absence of probable cause. Finally, the question of malice, as with most issues of mental state, is almost inherently a question of fact. Moreover, making all factual inferences in the plaintiff's favor, Starnes knowingly provided false information that Hart was married to a marihuana cultivator in order to secure a warrant for Hart's arrest, and Motley signed a criminal complaint against. Hart when he knew she had committed no crime. A reasonable juror would be entitled to conclude that Motley and Starnes maliciously prosecuted Hart, and the defendants' request for summary judgment is denied.

B. False Imprisonment

An action for false imprisonment requires proof of the following elements:

(1) A willful detention of the person;

(2) Against the consent of the person; and

(3) Without authority of law.

Randall's Food Markets, Inc. v. Johnson, 891 S.W.2d 640, 644 (Tex. 1995); *Sears, Roebuck & Co. v. Castillo*, 693 S.W.2d 374, 375 (Tex. 1985) (per curiam). In the context of an arrest, a valid warrant, duly issued by a judicial officer, provides a person with authority of law to detain another, and thus bars an action for false imprisonment. *James v. Brown*, 637 S.W.2d 914, 918 (Tex. 1982) (per curiam); *see also Avalos v.*

Mejia, 788 S.W.2d 645, 646 (Tex. App. – Corpus Christi 1990, no writ).

All of the defendants argue for summary judgment because Hart's arrest was effectuated pursuant to a valid warrant. This argument must fail, however, because genuine issues of material fact exist concerning the validity of the warrant – specifically, whether false information was presented and relevant information withheld by the defendants submitting the warrant application. If the actions of the defendants led to the improper issuance of a warrant unsupported by probable cause, then the chain of causation necessary for false imprisonment would not be broken. *Cf. Hale*, 899 F.2d at 400-01 (chain of causation not broken when facts withheld from magistrate); *Hand v. Gary*, 838 F.2d 1420, 1427-28 (5th Cir. 1988) (holding, in the context of a federal-law claim of false arrest, that a warrant defeats the claim *if* all relevant facts have been presented to an independent intermediary). Until the validity of the warrant is determined, therefore, summary judgment on the false imprisonment claim is inappropriate.[3] Red River County, however, is entitled to summary judgment because it has not waived its sovereign immunity. *Tex. Civ. Prac. & Rem. Code Ann.* § 101.057; *Gillum v. City of Kerrville*, 3 F.3d 117, 123 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 881 (1994).

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[3] Defendants Myrick, Motley, Starnes, and Red River County also assert that summary judgment is justified because probable cause existed to arrest Hart. The existence or absence of probable cause is a contested issue, and involves essentially the same dispute as the validity of the warrant. Summary judgment is therefore not justified on this ground as well.

C. Intentional Infliction of Emotional Distress

Texas recognizes the tort of intentional infliction of emotional distress, and requires proof of the following elements:

> (1) the defendant acted intentionally or recklessly;
>
> (2) the conduct was extreme and outrageous;
>
> (3) the actions of the defendant caused the plaintiff emotional distress; and
>
> (4) the emotional distress suffered by the plaintiff was severe.

Twyman v. Twyman, 855 S.W.2d 619, 621 (Tex. 1993); *Restatement (Second) of Torts* § 46 (1965). Outrageous conduct is that which goes "beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community."

Wornick Co. v. Casas, 856 S.W.2d 732, 734 (Tex. 1993); *Restatement (Second) of Torts* § 46, cmt. d. Further, "[i]t is for the court to determine, in the first instance, whether the defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery. . . . " *Wornick Co.*, 856 S.W.2d at 734; *Restatement (Second) of Torts* § 46, cmt. h. In a case involving law enforcement officials, an extreme abuse of authority can support liability under this tort. *Restatement (Second) of Torts* § 46, cmt. e.

Defendants Myrick, Motley, Starnes, and Red River County move for summary judgment on this claim, arguing that the plaintiff cannot establish any of the above elements. Hart and O'Brien do not request summary

judgment on the merits of this claim, but do urge that they are entitled to immunity for their actions.[4] *See infra* part V(D) (discussing state-law immunity).

The facts as alleged by the plaintiff and supported by her submission of evidence do not reveal that Myrick's conduct was sufficiently outrageous to make out a *prima facie* case of intentional infliction of emotional distress. The plaintiff's evidence suggests that Myrick may have searched Hart's home pursuant to an invalid warrant, but he did so without cause to know of the warrant's defects and, at the direction of his superiors. His actions do not indicate the intentional abuse of authority necessary to support liability. It is found that summary judgment should be granted as to Myrick. Red River County is also entitled to summary judgment because it has not waived its sovereign immunity. *Tex. Civ. Prac. & Rem. Code* Ann. § 101.057; *Gillum v. City of Kerrville*, 3 F.3d 117, 123 (5th Cir. 1993).

A reasonable juror, however, may determine that the conduct of Motley and Starnes was extreme and outrageous. The plaintiff alleges that Motley, as chief sheriff's deputy, signed a criminal complaint against a person he

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[4] Motley, Starnes, Myrick, and Red River County also assert an entitlement to immunity from the intentional infliction of emotional distress claim because it is "derivative of Plaintiff ['] s Fourth and Fourteenth Amendment claims." *Brief in Support of Defendants' Motion for Summary Judgment*, at 15. It is unclear precisely what type of immunity the defendants are referring to, and no case law is cited in support of this contention. If the defendants mean to assert that federal qualified immunity protects them from state-law damages claims, then they are incorrect.

knew to be innocent, and further, submitted false evidence to a judicial officer in order to ensure that the innocent citizen would remain in prison without bail. Likewise, the plaintiff alleges that Starnes, an attorney advising law enforcement officials, knowingly provided false information in order to obtain a warrant to arrest an innocent person and search her home. If proved, the jury could reasonably conclude that this abuse of authority constitutes extreme and outrageous conduct.

D. Official Immunity

Defendants O'Brien and Montana assert immunity from the state-law claims in this action.[5] Under this defense, which is substantially similar to its federal counterpart, "[g]overnment employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority." *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). O'Brien and Montana argue that the evidence demonstrates, as a matter of law, that they acted in good faith and within the scope of their authority.

While O'Brien and Montana were undoubtably acting within the scope of their authority, in the sense that they were on duty, conducting surveillance, applying for warrants, searching property, and arresting suspects, a fact issue remains as to whether they were exercising their duties in good faith. To satisfy the good faith element,

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[5] Starnes, Myrick, and Motley have not raised the defense of official immunity in their motion for summary judgment.

O'Brien and Montana must demonstrate that a reasonably prudent officer might have believed their actions were lawful. *See id.* at 656-57. To controvert such evidence, Hart must show that "no reasonable person in the defendant[s'] position could have thought the facts were such that they justified defendant[s'] acts." *Id.* at 657 (quoting *Post v. City of Fort Lauderdale*, 7 F.3d 1552, 1557 (11th Cir. 1993), *modified on reconsideration*, 14 F.3d 583 (11th Cir. 1994)). Both sides have put forward evidence from which a reasonable juror could draw either conclusion. Thus, summary judgment is inappropriate. *Cf. id.* (conceding that the good-faith test of state-law official immunity is "somewhat less likely to be resolved at the summary judgment stage than is the federal test").

V. Conclusion

Because of the number of defendants and complexity of the issues in this action, it is appropriate to summarize the live claims remaining after the disposition of the motions for summary judgment. The plaintiff's action under 42 U.S.C. § 1983 remains against O'Brien, Montana, Starnes, and Motley, in their individual capacities, subject to the possible defense of qualified immunity. Myrick is entitled to qualified immunity from all federal causes of action, and Red River County is not subject to liability under § 1983.

As to the pendent state-law claims, the plaintiff maintains a cause of action for false imprisonment against all individual defendants, subject to O'Brien and Montana's possible defense of official immunity. The malicious prosecution claim and the intentional infliction

of emotional distress claim is still live against O'Brien, Montana, Starnes, and Motley, subject to O'Brien and Montana's possible defense of official immunity. While the false imprisonment claim is still live against Myrick, the intentional infliction of emotional distress claim against him is dismissed. No claims remain against Red River County.

Accordingly, it is **ADJUDGED** that the defendants, motion for summary judgment should be, and is hereby, **GRANTED IN PART AND DENIED IN PART.** It is **ADJUDGED** that all claims against defendant Red River County should be, and are hereby, **DISMISSED WITH PREJUDICE.** Further, it is **ADJUDGED** that C.T. Myrick's request for qualified immunity should be, and is hereby, **GRANTED.** Further, it is **ADJUDGED** that the claims against C.T. Myrick under 42 U.S.C. § 1983 should be, and are hereby, **DISMISSED WITH PREJUDICE.** Further, it is **ADJUDGED** that the claim against defendant C.T. Myrick for intentional infliction of emotional distress should be and is hereby, **DISMISSED WITH PREJUDICE.** Further, it is **ADJUDGED** that defendant Jeff Starnes's request for absolute immunity should be, and is hereby, **DENIED.** Further, it is **ADJUDGED** that all other requests for summary judgment should be, and are hereby, **DENIED.** Further, it is **ADJUDGED** that defendant O'Brien and Montana's objection to plaintiff's inadmissible summary judgment evidence is **MOOT.**

SIGNED this 26th day of January, 1996.

/s/ Wm. Wayne Justice
William Wayne Justice
United States
District Judge

APPENDIX D

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

AMENDMENT IV – SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon Probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

APPENDIX E

42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other Proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; Pub.L. 96-170, § 1, Dec. 29, 1979, 93 Stat. 1284.)

No. 98-662

(2)

FILED
NOV 20 1998
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SUPREME COURT, U.S.

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM, 1998

PEGGY NELL HART,
Petitioner,

v.

HAROLD B. O'BRIEN, FRANK MONTANA, C.T. MYRICK, JEFF STARNES, AND CARL MOTLEY,
Respondents.

On Petition for Writ of Certiorari
To the Fifth Circuit Court of Appeals

RESPONDENTS O'BRIEN AND MONTANA'S BRIEF IN OPPOSITION

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13pp

QUESTION PRESENTED

1. Whether the existence of a fact dispute necessarily precludes interlocutory appellate review of the denial of summary judgment based on qualified immunity.

LIST OF ALL PARTIES

Petitioner:	Peggy Nell Hart
Respondents:	Harold O'Brien Frank Montana

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OPINIONS BELOW

The district court's unreported order denying Respondents' claim of qualified immunity is set out in the Appendix to the Petition at C-1. The panel opinion of the Fifth Circuit Court of Appeals, reversing the district court and rendering judgment, is reported at 127 F.3d 424 (5th Cir. 1997) and is included in the Petitioner's Appendix at A-1. The Fifth Circuit Court of Appeals' unreported denial of *en banc* reconsideration is included in the Petitioner's Appendix at B-1.

STATEMENT OF JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The rights at issue arise out of the Fourth Amendment to the United States Constitution. The statutory vehicle for Petitioner's suit is 42 U.S.C. § 1983.

STATEMENT

Petitioner Peggy Nell Hart's characterization of the facts in this case as "hotly disputed" is misleading. What follows is a synopsis of the facts which were not disputed below:

In August of 1992, an aerial drug investigation revealed a marijuana field growing in close proximity to Hart's rural residence. Respondents Harold O'Brien and Frank Montana, narcotics officers with the Texas Department of Public Safety, were assigned to investigate and the area was placed under surveillance. O'Brien learned that Hart's neighbor, David Conine, had a previous arrest on a drug-related offense.

During their two-week surveillance, various law enforcement officers observed Hart interacting with Conine. For example, she kept a horse on Conine's property and tended to Conine's animals. When her horse was injured, Hart frequently

entered Conine's trailer home for medical supplies.

Hart also appeared to have a personal relationship with Conine. Officers observed Hart watching television at his trailer home late at night and performing domestic chores, such as cooking meals for Conine and using his washer and dryer. She accompanied Conine on trips into town and they dined out together. Hart spent the night in the trailer on at least four occasions and went on at least one overnight trip with Conine during the surveillance period. Hart was present in Conine's trailer for a least part of his meeting with another known drug dealer, Jerry Benton.

On the basis of their observations, O'Brien sought a warrant for the arrest of both Conine and Hart and the search of certain property, including Conine's trailer and barn, a white house with black shutters thought to be vacant, various outbuildings, and several cars, two of which were registered to Hart. One of the affidavits supporting probable cause stated that Hart lived with Conine in the trailer home and was the wife of a known marijuana grower in the area, the latter allegation having been provided to O'Brien by a local prosecutor. These statements were later found to be incorrect. The white house with black shutters was, in fact, rented by Hart and Hart was not the same "Peggy Hart" married to the known marijuana grower.

REASONS FOR DENYING THE WRIT

I. The questions posed by Petitioner do not merit this Court's attention.

Rule 10.1 of the Rules of the Supreme Court provides that *certiorari* jurisdiction is a matter of judicial discretion, not of right, and will be granted only when there are special and compelling reasons to justify its exercise. Petitioner advances no such reason in this case, particularly in regard to the Fifth Circuit's determination that O'Brien and Montana were entitled to qualified immunity. Further, as demonstrated below, the Petitioner fails to demonstrate either that the Fifth Circuit's exercise of jurisdiction in this case was in error or that there exists any general confusion

among the courts of appeal in applying this Court's precedent. Thus, Petitioner has advanced no compelling reason justifying the exercise of *certiorari* jurisdiction, and none exist.

II. This Court's holdings in *Johnson v. Jones* and *Behrens v. Pelletier* were sufficiently clear so as not to require the additional clarification sought by Petitioner.

Hart urges this Court to grant *certiorari* claiming that there exists a general confusion among the circuit courts of appeal in the application of *Johnson v. Jones*, 515 U.S. 304 (1995), and that the Fifth Circuit's consideration of the officers' appeal in particular conflicted with the holding in *Johnson*. The officers counter that Hart's argument places undue emphasis on the differing conclusions of the courts of appeal. Any disparities in application do not reflect a need for clarification but are instead typical of the evolutionary process following the articulation of a new standard by this Court. Further, qualified immunity and the availability of interlocutory appeal are not, by their nature, questions susceptible to easy or formulaic determinations. As this Court made clear in *Johnson* and its progeny, whether or not the denial of qualified immunity may be immediately appealed depends on the circumstances of that denial.

The right to appeal a denial of qualified immunity was initially recognized in *Mitchell v. Forsyth*, 472 U.S. 511 (1985). In *Mitchell*, the Court found that the denial of qualified immunity was immediately appealable as a conclusive determination of the issue and as involving a claim of right "separable from, and collateral to, rights asserted in the action." *Mitchell*, 472 U.S. at 527, *citing Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978) *and Cohen v. Beneficial Industrial Loan Corp.* 337 U.S. 541 (1949).

The Court's holding in *Mitchell* was expressly limited to denials of qualified immunity that turn on an issue of law. *Mitchell*, 472 U.S. at 530. *Mitchell* thus provided a "tolerably clear rule," even prior to the clarification provided by *Johnson*. 15A C. WRIGHT, A. MILLER, & E. COOPER § 3911 (1992). In

Johnson, the Court was given the opportunity to further differentiate appeals involving issues of fact and law.

An order is based on an issue of fact when it determines only a question of "evidence sufficiency" or which facts a party may or may not be able to prove at trial. *Johnson*, 515 U.S. at 313. Conversely, an order is based on an issue of law when it concerns only the application of established legal principles, such as whether an official's conduct was objectively reasonable in light of clearly established law, to a given set of facts. In *Johnson*, there was no "given set of facts" because the single fact material to the defendants' "we didn't do it" defense, whether the defendants were present during the plaintiff's beating, was disputed. *Johnson*, 515 U.S. at 307-308. The *Johnson* Court concluded that the defendants presented an issue of fact or evidentiary sufficiency, rather than one of law, and declined to exercise jurisdiction. *Johnson*, 515 U.S. at 313, 319-320.

Although the language of *Johnson* may have led some courts to the erroneous conclusion that the existence of any factual dispute will preclude an immunity appeal, this misunderstanding was resolved by *Behrens v. Pelletier*, 516 U.S. 299 (1996). In *Behrens*, the Court made the common-sense observation that "denial of summary judgment often includes a determination that there are controverted issues of material fact" and explained that *Johnson* does not mean that every such denial of summary judgment is unappealable. *Behrens*, 516 U.S. at 312-313.

Under Federal Rule of Civil Procedure 56, a district court may deny a motion for summary judgment if it finds that a genuine issue of material fact remains. FED. R. CIV. P. 56(c). However, as recognized by the Fifth Circuit in other cases, a district court's decision on summary judgment involves two separate determinations: whether the fact in dispute is material and whether the dispute is genuine. *Colston v. Barnhart*, 143 F.3d 282, 284 (5th Cir. 1998). Genuineness of a dispute is measured by whether the evidence is sufficient to permit a reasonable factfinder to find for the nonmoving party and interlocutory appellate review of a district court's finding that a factual dispute is genuine thus foreclosed by the holding in *Johnson*. *Colston*, 143 F.3d 284; *Johnson*, 515 U.S. at 313 *citing Mitchell*, 472 U.S. at 530. The

question of materiality, on the other hand, is one of law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

Taken together, *Mitchell*, *Johnson*, and *Behrens* provide coherent instruction for lower courts' determinations on the appealability of qualified immunity issues. Like any rule, the *Johnson* standard requires care in its application and is susceptible to abuse. Although Hart cites these concerns as reasons to grant *certiorari* in this case, she has not offered any indication that these issues have become more troublesome in the three years since they were rejected by the Court in *Johnson*. *Johnson*, 515 U.S. 318-319. Although Petitioner contends that the various courts of appeal are in "hopeless disarray" in applying *Johnson* and *Behrens*, simply noting that in some cases courts have found that they had jurisdiction to review a denial of qualified immunity while others found that they did not is too simple an analysis. A comparison of *Marshall v. Sullivan*, 105 F.3d 47 (2nd Cir. 1996), and *Tangwall v. Stuckey*, 135 F.3d 510 (7th Cir. 1998), two of the cases cited by Petitioners, is illustrative of this point.

In *Tangwall*, the district court denied an police officer's claim of qualified immunity when it found issues of material fact concerning the existence of probable cause. Citing *Behrens*, the Seventh Circuit reasoned that the mere existence of a factual dispute did not automatically foreclose an appeal of the denial of qualified immunity. *Tangwall*, 135 F.3d at 515. In holding that it had jurisdiction, the Seventh Circuit found that the factual disputes identified by the district court were immaterial to determining whether the officer's actions were objectively reasonable for purposes of qualified immunity. *Tangwall*, 135 F.3d at 516. Thus, the *Tangwall* court was not presented with the type of evidence sufficiency or "genuineness" problem found in *Johnson* and was able to determine, in light of the facts that were undisputed, the question of qualified immunity.

The existence of probable cause was also at issue in *Marshall*. In denying the police officer's claim of qualified immunity, the district court found that genuine issues of material fact precluded summary judgment on the issues of whether it was reasonable for the officer to believe that probable cause existed and whether probable cause existed in fact. *Marshall*, 105 F.3d at

54. Finding itself without jurisdiction, the Second Circuit held that the facts in dispute were both genuine and material. *Marshall*, 105 F.3d at 54. Consistent with the holdings of *Johnson* and *Behrens*, the existence of the evidence sufficiency problem precluded interlocutory appellate review.

Like the courts in *Tangwall* and *Marshall*, the Fifth Circuit's exercise of jurisdiction in this case fell within the parameters of the *Johnson* and *Behrens* holdings. Rather than mounting an improper challenge to the sufficiency of Hart's evidence on the disputed issues of fact, O'Brien and Montana challenged the materiality of those issues on appeal. As articulated by the Fifth Circuit, "the officials may argue on interlocutory appeal that, contrary to the district court's judgment, enough uncontested facts exist to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune." *Hart*, 127 F.3d at 436; *see also Johnson v. Fankell*, 117 S. Ct. 1800, 1806 (1997) (noting that *Johnson v. Jones* allowed interlocutory appeal where the issue was whether a given set of facts showed a violation of clearly established law).[1]

In closing, there is little support for Petitioner's contention that further clarification of *Johnson* and *Behrens* is necessary to create a workable standard for interlocutory review of a denial of qualified immunity. This Court's holdings acknowledge that in some circumstances interlocutory appellate review of a denial of qualified immunity is appropriate while in other circumstances it is not. It is therefore unremarkable that the courts of appeal have exercised their jurisdiction in some cases and not in others. The Fifth Circuit's conclusion that *Johnson* and *Behrens* permitted it

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[1] See also *Lee v. Sandberg*, 136 F.3d 94 (2nd Cir. 1997) (court found that it had jurisdiction where defendants' accepted plaintiff's facts as true); *Naylor v. State of Louisiana Dept. of Corrections*, 123 F.3d 855 (5th Cir. 1997) (court lacked jurisdiction due to inadequate development of the record); *Clash v. Beatty*, 77 F.3d 1045 (7th Cir. 1996) (court lacked jurisdiction where it could not determine issue on the basis of the undisputed facts); *Chateaubriand v. Gaspard*, 97 F.3d 1218 (9th Cir. 1996) (court lacked jurisdiction to resolve factual dispute, but could address qualified immunity issue in light of the undisputed facts).

to accept jurisdiction over this case presented no conflict with the holdings of this Court. Further, any variance or disparity in the lower courts' conclusions under *Johnson* is attributable to the differing circumstances faced by those courts and does not warrant this Court's attention or further refinement of *Johnson*. The jurisdictional "quagmire" claimed by Petitioners does not exist and *certiorari* review of their claim is unnecessary.

CONCLUSION

For the foregoing reasons, the arguments presented by Petitioner in support of her request for a writ of *certiorari* are insufficient to warrant the exercise of this Court's jurisdiction. The petition for writ of *certiorari* should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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CLERK

No. 98-662

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

PEGGY NELL HART,

Petitioner,

vs.

HAROLD B. O'BRIEN, FRANK MONTANA, C. T. "TOMMY" MYRICK, JEFF STARNES, and CARL MOTLEY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS JEFF STARNES, CARL MOTLEY and C.T. "TOMMY" MYRICK

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Respondents C. T. "Tommy" Myrick, Jeff Starnes, and Carl Motley respectfully pray that the Supreme Court deny the Petition for Writ of *Certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 6, 1997, and the denial of the Petition for Rehearing and Suggestion for Rehearing *En Banc* dated July 23, 1998.

STATEMENT OF THE CASE

On August 11, 1992, during an aerial investigation, a marijuana field was discovered growing in close proximity to a residence occupied by David Conine and Petitioner Peggy Hart which was located on property adjacent to Conine's residence. The drug task force in the area, headed by Respondents O'Brien and Montana, began an almost two week surveillance of the Conine residence and the surrounding property. During the surveillance, the officers observed numerous activities which led the drug task force officials to believe that Petitioner was residing at the Conine residence and could have been involved with Conine in his marijuana manufacturing activities.[1] Petitioner admitted, and the officials observed, that she spent several night at Conine's trailer. On one of the nights that Petitioner spent at Conine's trailer, Petitioner and Conine had just returned from Louisiana and stayed overnight in a hotel together. Upon their return to Conine's trailer, the two were seen removing clothing from Conine's pickup truck and taking the clothing into Conine's trailer.

Petitioner also admitted that it was quite possible that she could have been seen drinking coffee on Conine's porch in the

1. Respondents Starnes and Motley were not involved in the surveillance or investigation of the property. Starnes was not directly involved until he assisted in the preparation of the affidavits for the warrants and was present during the actual arrest and search. Similarly, Respondent Motley was not involved in the investigation and was not present until the time of the arrest and search. Motley also filed the actual complaint against Petitioner.

mornings, and that she frequently did laundry at his trailer. In addition, Petitioner received telephone calls at Conine's trailer and watched television there with him. Similarly, Petitioner cooked for Conine in his trailer.

It is undisputed that Petitioner spent a great deal of time on Conine's property, where the marijuana was growing. Petitioner provided an innocent explanation for her many visits, but admitted the visits. Petitioner explained in deposition that she kept a horse on Conine's property. Petitioner was required to spend a great deal of additional time on his property caring for the injured horse. Petitioner would, in fact, frequently go into Conine's trailer to retrieve rags or towels or other items needed to care for the horse rather than returning to her own house. Petitioner kept the injured horse near Conine's barn and was in and out of the barn quite frequently. This was the same barn in which marijuana, cocaine, and other illegal items were found during the ultimate search of the property. Not only did Petitioner care for Conine's animals on his property (in addition to caring for her own horse which she boarded on the property), she also used a storage building located on his property to store furniture, a file cabinet, and numerous papers.

Petitioner was seen traveling in Conine's pickup truck. She admitted in her testimony that she would frequently go to town with Conine to pay electric bills, and they would occasionally eat out together. Petitioner also said that she traveled in the pickup truck with Conine to a trash dump site on the property. She testified that she never went all the way to the dump site, which required passage through a very large marijuana field surrounding the site, but remained at the gates that needed to be opened while Conine actually threw the garbage. Nevertheless, the officers did see her travel with Conine in the vicinity of the trash dump site.

It was undisputed that the marijuana plants were not confined to Conine's property and spread over onto adjacent tracts of land. Of the six different marijuana patches containing the 1,132 marijuana plants, patch number 6, containing 188 plants, was located just behind Peggy Hart's house. As a practical matter, the area included in the search was one large area. The warrant affidavit described it by a metes and bounds description of one large area, a hand drawn map which depicted the fence and the location of each building on the property to be searched, including the white house with black trim where Petitioner said she lived, Conine's trailer, as well as a written description of the house, the trailer, the barn, etc. Conine's trailer was on one side of the property, and Hart's white house with black trim was located on an adjoining side of the property; both backed up to the same field. Thus, regardless of which building Hart was "residing" in, it is undisputed that she was residing in the midst of a marijuana "farm" and she had a relationship with the "farmer" of the entire crop.

After the two week investigation, assistant County prosecutor, Jeff Starnes, assisted other officials in obtaining search and arrest warrants and in preparation of their supporting affidavits. It was undisputed that defendant Starnes (mistakenly) provided false information in the affidavits for search warrants and that he had the Petitioner confused with a different Peggy Hart who was married to a known drug cultivator.

On August 25, 1992, Peggy Hart and David Conine were arrested and taken to jail during the search of their property. The law enforcement officials discovered on Conine's property large amounts of incriminating evidence of the fact that marijuana was being grown and produced on the property. This included 1,132 live, growing marijuana plants, baggies of marijuana seed, and drug manufacturing equipment such as beakers, heat lamps, and condensers. Inside Conine's trailer, the officials found two scales

for weighing drugs, two bongs, two baggies of marijuana, the butt of a marijuana cigarette in an ash tray, cigarette papers, and almost $19,000 in cash.

On August 26, 1992, the day after Petitioner's arrest, bail was set at $50,000. Unfortunately for Petitioner, no one attempted to bail her out until a bond was posted on September 11, 1992.

REASONS FOR DENYING THE WRIT

JURISDICTIONAL REASONS

I.

THIS COURT SHOULD DENY THE PETITION FOR WRIT OF *CERTIORARI* AS THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT IT HAD JURISDICTION TO CONSIDER THE INTERLOCUTORY APPEAL FROM THE DENIAL OF RESPONDENTS' MOTION FOR SUMMARY JUDGMENT BASED ON ABSOLUTE AND QUALIFIED IMMUNITY.

The primary question presented by the Petition for Writ of *Certiorari* is whether the United States Court of Appeals for the Fifth Circuit erred in concluding that it had jurisdiction to consider an interlocutory appeal from the district court's decision denying Respondents' motion for summary judgment based on qualified immunity. The question turns on a determination of whether the circuit court correctly determined that, based on the undisputed facts, Respondents' actions violated clearly established law. In other words, the question turns on a determination of whether a reasonable public official under the same or similar circumstances presented to the Respondents could have believed that his or her actions were lawful, in light of clearly established law and the information that was undisputedly possessed by each official.

A court of appeals has jurisdiction of appeals from all final district court decisions. 28 U.S.C. § 1291. However, in *Mitchell v. Forsythe* this Court held that denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment. 472 U.S. 511, 526, 105 S. Ct. 2806, 2816, 86 L. Ed. 2d 411 (1985); *see also Coleman v. Houston Ind. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997) (" 'Denial of summary judgment on the ground of qualified immunity is immediately appealable to the extent that the question on appeal is whether the undisputed facts amount to a violation of clearly established law.' ") (quoting *Kelly v. Foti*, 77 F.3d 819, 821 (5th Cir. 1996)).

In *Johnson v. Jones*, 515 U.S. 304, 132 L. Ed. 2d 238, 115 S. Ct. 2151 (1995), and *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996), this Court recently clarified the scope of *Mitchell* and squarely addressed the appealability of orders denying summary judgment on the basis of qualified immunity. In *Johnson*, the Court held that a defendant may not appeal such an order insofar as that order determines whether or not the summary judgment record sets forth a "genuine" issue of fact for trial. 515 U.S. at 319-20. In *Behrens*, the Respondent argued that an appeal of the district court's denial of summary judgment was not available under *Johnson* because the district court had concluded that "material issues of fact remained." 116 S. Ct. at 842. The Court was quick to point out, however, that the Respondent had misread *Johnson*, observing that the denial of summary judgment often includes a determination that there are controverted issues of material fact and that "*Johnson* surely does not mean that every such denial of summary judgment is nonappealable." *Id.* Rather, the Court explained,

> *Johnson* held, simply, that determinations of evidentiary sufficiency at summary judgment are not

> immediately appealable merely because they arise in a qualified-immunity case[.]

Id. This Court then held that "*Johnson* permits a defendant to claim on appeal that all of the conduct which the district court deemed sufficiently supported for purposes of summary judgment" was objectively reasonable, and further instructed that where the district court has not identified the particular charged conduct that it deemed adequately supported,

> *Johnson* recognizes that under such circumstances "a court of appeals may have to undertake a cumbersome review of the record to determine what facts the district court, in the light most favorable to the nonmoving party, likely assumed."

Id. (quoting *Johnson*, 515 U.S. at 319).

The *Johnson* and *Behrens* decisions rest on the recognition that when a district court denies a motion for summary judgment on the ground that "genuine issues of material fact remain," the court has made two distinct legal conclusions. First, the Court has concluded that the issues of fact in question are genuine, *i.e.*, the evidence is sufficient to permit a reasonable fact finder to return a verdict for the nonmoving party. *See Ginsberg 1985 Real Estate Partnership v. Cadle Co.*, 39 F.3d 528, 531 (5th Cir. 1994) (defining "genuineness"). Second, the Court has concluded that the issues of fact are material, *i.e.*, resolution of the issues might affect the outcome of the suit under governing law. *See id.* (defining "materiality"). *Johnson* makes clear that an appellate court may not review a district court's determination that the issues of fact in question are genuine. As this Court explained in *Behrens*,

> determinations of evidentiary sufficiency at summary judgment are not immediately appealable merely because they happen to arise in a qualified-immunity

> case; if what is at issue in the sufficiency determination is nothing more than whether the evidence could support a finding that particular conduct occurred, the question decided is not truly "separable" from the Petitioner's claim, and hence there is no "final decision" under *Cohen* and *Mitchell*.[2]

116 S. Ct. at 842. *Behrens*, on the other hand, makes clear that an appellate court is free to review a district court's determination that the issues of fact in question are material, which is exactly the analysis undertaken by the appellate court in this case.

The Fifth Circuit held, in relevant part:

> In the instant case, the District Court did not deny summary judgment because there was a genuine dispute of material fact that the officials are responsible for searching Hart's home, arresting her, and not taking any action in her detention. The parties did not disagree over whether the officials had engaged in such conduct. Rather, the court denied summary judgment because (1) "disputed issues of material fact" existed over

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2. In *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949), the Court held that orders

> which finally determine claims of right separable from, and collateral to, rights asserted in [an] action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated,

are "final decisions" under 28 U.S.C. § 1291. In *Mitchell v. Forsyth*, 472 U.S. 511, 528, 86 L. Ed. 2d 411, 105 S. Ct. 2806 (1985), the Court held that a district court's order denying a defendant's motion for summary judgment on the basis of qualified immunity, to the extent it turns on an issue of law, is appealable under *Cohen*.

> whether the officials violated Hart's clearly established constitutional rights of which a reasonable person would have known . . . and (2) the underlying facts are too unsettled to determine if the officials acted with objective reasonableness. In short, the District Court determined that there were sufficient time contested facts to establish that the officers engaged in the conduct in question, but that there were insufficient uncontested facts to decide whether the officials enjoy immunity as a matter of law. Hence, the officials may argue on interlocutory appeal (as they do here) that, contrary to the District Court's judgment, enough uncontested facts existed to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. . . .

Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997) (citations omitted). Thus, the circuit court engaged in the precise analysis expressly allowed by this court in *Behrens*, to wit, a determination of whether the factual issues relied upon by the district court in denying summary judgment were, in fact, "material," as a matter of law, to a determination of whether Respondents were entitled to qualified immunity. The circuit court correctly determined that there were no genuine issues of *material* fact and that Respondents were entitled to judgment as a matter of law.

In this case, the material facts of the investigation and arrest were undisputed. All that remained to be resolved following the district court's denial of Respondents' motion for summary judgment was a determination of whether those undisputed facts established "probable cause" for the arrest. On appeal, Respondents contended that the undisputed facts established probable cause and, at the very least, that reasonable minds could differ concerning whether those facts constituted probable cause. Under the Supreme Court's decision in *Malley v. Briggs*, 475 U.S. 335, 344-45, 106

S. Ct. 1092, 89 L. Ed. 271 (1986), if reasonable minds could differ on whether there was probable cause to arrest Petitioner, then the officials enjoy qualified immunity as a matter of law. The first portion of the Petition for Writ of *Certiorari* implicitly acknowledges that the circuit court undertook such an analysis:

> Issues regarding the facts possessed by the defendants at the time of the search and arrest are hotly disputed. *These disputes are material by any definition.* Simply put, the Fifth Circuit did not have jurisdiction to hear the present appeal under *Johnson, supra,* because the denial of summary judgment on the basis of qualified immunity *was based on material factual disputes.*

Petition for Writ of *Certiorari* at 8-9 (emphasis added). The circuit court correctly determined that the issue presented by Respondents was a legal issue that could be determined in an interlocutory appeal.

II.

THIS COURT SHOULD NOT GRANT *CERTIORARI* BASED ON PETITIONER'S ASSERTION THAT THE CIRCUIT COURT'S OPINION WILL "OPEN UP THE FLOOD GATES OF LITIGATION MAKING VIRTUALLY EVERY DENIAL OF SUMMARY JUDGMENT IN QUALIFIED IMMUNITY CASES IMMEDIATELY APPEALABLE."

The circuit court's conclusion that it had jurisdiction to consider Respondents' interlocutory appeal was expressly and correctly based on this Court's a decision in *Behrens v. Pelletier*, 516 U.S. 299, 116 S. Ct. 834, 133 L. Ed. 2d 773 (1996). As quoted above, the circuit court found:

> [T]he officials may argue on interlocutory appeal (as they do here) that, contrary to the District Court's

> judgment, enough uncontested facts existed to determine that they are immune as a matter of law and that, on the basis of these facts, they are immune. *Behrens v. Pelletier*, __ U.S. __, 116 S. Ct. at 842; *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 531 (5th Cir. 1997).

Hart v. O'Brien, 127 F.3d 424, 436 (5th Cir. 1997). Hence, the circuit court merely applied the legal principle established in *Behrens* that a circuit court has jurisdiction to consider whether contested facts relied upon by a district court denying qualified immunity are "material," and the corollary that a circuit court has jurisdiction to consider whether the uncontested facts are sufficient to establish entitlement to qualified immunity as a matter of law.

Rather than "making the determination regarding genuine issues of fact appealable whenever there [are] any undisputed facts," as Petitioner contends, the circuit court merely applied established precedent and held that an official may appeal the denial of qualified immunity when there are sufficient undisputed facts to establish entitlement to immunity as a matter of law.

III.

THE COURT SHOULD NOT GRANT THE PETITION FOR *CERTIORARI* BASED ON PETITIONER'S ASSERTION THAT THE LOWER COURTS ARE IN HOPELESS DISARRAY IN APPLYING *JOHNSON* AND *BEHRENS*.

Petitioner's assertion that "[t]he Courts of Appeal are in complete disarray in applying *Johnson* and *Behrens*, and there is no consistency either within circuits or between the circuits in application of these cases" is simply incorrect. As an example of alleged lack of consensus within the Fifth Circuit, Petitioner cites the 8 to 8 vote in determining whether to rehear, *en banc*, the case of *Colston v. Barnhardt*, 146 F.3d 282, 286 (5th Cir. 1998).

However, the "complex panorama of doctrine and dissent" referred to in Judge DeMoss's dissent in *Colston* has been resolved. In *Colston*, the dissent concluded that the issue of the objective reasonableness of an official's actions could not be separated from the merits of the action, and that an order denying qualified immunity based on a factual dispute concerning objective reasonableness could not be subject to the collateral orders doctrine. *Id.* at 287.

Since the publication of Judge DeMoss's dissent, the Fifth Circuit has taken the opportunity to solve the apparent dilemma concerning appeals based on alleged objective reasonableness of an official's actions. In *White v. Balderama*, 153 F.3d 237, 1998 U.S. App. LEXIS 21253, *12 (5th Cir. 1998), the Fifth Circuit acknowledged the *Johnson* and *Behrens* decisions, noted that objective reasonableness is determined as a matter of law, and merely observed that a district court's general conclusion that genuine issues of material fact preclude judgment as a matter of law — without specifying those facts — leaves the circuit court unable to tell whether the official is making a reviewable materiality challenge or an unreviewable genuineness challenge on appeal." *White*, 153 F.3d at __, 1998 U.S. App. LEXIS 21253 at 12. The circuit court ultimately made

> a limited remand to the District Court for the purpose of allowing it to articulate specifically what factual scenario it believes emerges from viewing the summary judgment evidence in the light most favorable to [the non-movant].

Id., 1998 U.S. App. LEXIS 21253 at 13. In the same case, the Fifth Circuit restated its holding in *Colston*:

> In *Colston v. Barnhardt*, 146 F.3d 282 (5th Cir. 1998), *denying reh'g in* 130 F.3d 96 (5th Cir. 1997), we recently observed that when a District Court denies

summary judgment on the basis that genuine issues of material fact exist, it has made the following distinct legal conclusions:

> First, the court has concluded that the issues of fact in question are genuine, *i.e.*, the evidence is sufficient to permit a reasonable fact finder to return a verdict for the nonmoving party [with respect to the particular fact issues]. Second, the court has concluded that the issues of fact are material, i.e., resolution of the issues might affect the outcome of the suit under governing law.

Id. at 284 (citations omitted).

Id.; 1998 U.S. App. LEXIS 21253 at 6. The holding in *Colston* is entirely consistent with this Court's holdings in *Johnson* and *Behrens*. Moreover, since, in the case at bar, the district court made specific findings regarding the factual scenario that emerged in its determination and therefore enabled the circuit court to determine whether the disputed facts were material, the alleged confusion cited by Petitioner is irrelevant to consideration of the issues presented in the Petition for Writ of *Certiorari*.

In sum, while other circuit courts may have produced conflicting opinions regarding the interpretation of *Johnson* and *Behren's*, the Fifth Circuit's decision in the case at bar is not emblematic of any such confusion.

QUALIFIED IMMUNITY REASONS

I.

THE CIRCUIT COURT'S OPINION DOES NOT "EXPAND QUALIFIED IMMUNITY AT THE EXPENSE OF ORDINARY CITIZENS," AS PETITIONER CONTENDS.

Petitioner contends that the opinion of the circuit court represents an "attempt to expand qualified immunity at the expense of ordinary citizens." Petition for Writ of *Certiorari* at 16. The basis for Petitioner's contention is that the circuit court's opinion erodes Fourth Amendment protections, "including the long accepted principle that a facially valid search warrant is void when it is obtained on the basis of an affiant's false statement . . ." *Id.* This contention is apparently based on Respondent Starnes' admittedly incorrect belief that Petitioner was the Peggy Hart that was married to a reputed drug cultivator, Stanley Hart.

The circuit court correctly observed that Respondent Starnes did not sign the affidavit and was not present when Respondent O'Brien requested the warrant, but that Respondent Starnes did help draft the affidavit and was the exclusive source of the inaccurate information about Petitioner's marital status. *Hart v. O'Brien*, 127 F.3d 424, 432 (5th Cir. 1997). Based on the fact that Petitioner alleged that Starnes provided false information intentionally or recklessly, the circuit court concluded that Petitioner stated a claim for violation of her Fourth Amendment rights. *Id.* at 449. The circuit court then squarely addressed the issue of whether Respondent Starnes demonstrated that there were no genuine issues of material fact regarding his assertion that he did not violate any of Petitioner's clearly established Fourth Amendment rights; in other words, that he did not intentionally or recklessly include false information in the affidavit. *Id.*

The circuit court concluded that there was no evidence that Respondent Starnes knew the information was inaccurate before giving it to Respondent O'Brien to be included in the affidavit. *Id.* The court further concluded that although Respondent Starnes knew the other Peggy Hart, there was no evidence that he had any reason to believe that "there might be two Peggy Harts within this rural community so as to raise serious doubts as to the accuracy of his statements to O'Brien." *Id.*

In sum, the circuit court's analysis of Respondent Starnes' entitlement to qualified immunity did not rest on a question of whether the given set of undisputed facts were material, but rather on a question of whether the evidence presented any genuine issues of fact. The analysis was based on well-established principles governing summary judgment review.

II.

THE CIRCUIT COURT DID NOT HOLD THAT AN OFFICIAL WHO KNOWINGLY OR RECKLESSLY GIVES FALSE INFORMATION AND WITHHOLDS EXCULPATORY INFORMATION IN THE PROCUREMENT OF A WARRANT IS SHIELDED BY QUALIFIED IMMUNITY; PETITIONER'S ASSERTION TO THE CONTRARY IS SIMPLY WRONG.

The circuit court did not hold that an official who knowingly or recklessly gives false information and withholds exculpatory information in the procurement of a warrant is shielded by qualified immunity; Petitioner's assertion to the contrary is simply wrong.

The legality of a warrant is determined in light of the information available to police officers at the time they obtain it. *Maryland v. Garrison*, 480 U.S. 79, 85-86, 107 S. Ct. 1013, 1018, 94 L. Ed. 2d 72 (1987). A facially valid warrant is void when it is obtained on the basis of an Affiant's false statement that he knowingly and intentionally made, or made with reckless disregard

of the truth and if the false statement is necessary to the finding of probable cause. *Franks v. Delaware*, 438 U.S. 154, 155-56, 57 L. Ed. 2d 667, 98 S. Ct. 2674 (1978).

As stated above, the circuit court found that there were no genuine issues of fact to contradict Respondent Starnes' allegation that he did not intentionally, deliberately, or recklessly provide false information for inclusion in the affidavit. *Hart*, 127 F.3d at 449-50. The circuit court correctly determined that Petitioner did not present any evidence that Respondent Starnes intentionally, deliberately, or recklessly misinformed the officer who made the affidavit, *Id.*; moreover, for purposes of this Court's review, Petitioner does not assert that the circuit court's determination was erroneous. While it is undisputed that Respondent Starnes learned, sometime before the execution of the warrant, that Stanley Hart had become a drug counselor and was presumably no longer a marijuana cultivator, the circuit court correctly determined that there was no evidence "to impugn the truthfulness of his statement that Stanley Hart is someone known to have cultivated marijuana." *Id.* at 449, n.12.

In sum, the circuit court's analysis of Respondent Starnes' entitlement to qualified immunity did not rest on a question of whether the given set of undisputed facts were material, but rather on a question of whether the evidence presented any genuine issues of fact. The analysis was founded on well-established principles governing summary judgment review.

III.

THERE IS NO AUTHORITY FOR THE PROPOSITION THAT A PROSECUTOR/LEGAL ADVISER WHO IS PRESENT AT A SEARCH TO INFORM LAW ENFORCEMENT OFFICERS OF HIS DOUBTS THAT THE WARRANT SHOULD BE EXECUTED AS WRITTEN.

Neither Petitioner nor Respondents have been able to uncover any direct authority for the proposition that a prosecutor "tagging along on a search" has a duty to inform law enforcement officers that he has doubts that the warrant should be executed as written. Petitioner's contention apparently addresses the alleged inaction of Respondent Starnes when he realized, upon seeing her in the front yard of the property to be searched, that Petitioner was not the Peggy Nell Hart he identified as being married to Stanley Hart. Of course, there is no contention that Petitioner is other than the Peggy Nell Hart who was observed by the drug task force in and around the marijuana crops. Respondent Starnes was not an "officer," did not make an arrest, and had no apparent authority to countermand the dictates of the warrant; Petitioner's intimations to the contrary should be unavailing as they are unsupported and insupportable by any evidence in the record that was presented to the district and circuit courts.

Qualified immunity is intended to protect individuals, when sued in their individual capacity, from personal liability when the area of law is evolving. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982)

> If the law at the time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to "know" that the law forbade conduct not previously identified as unlawful.

Id.

In light of the complete lack of any direct case law or statutory authority on this question, the circuit court, citing *Harlow*, correctly determined that there were no genuine issues of material fact and Respondent Starnes was entitled to qualified immunity as a matter of law because he did not violate a clearly established right by failing to stop the search.

CONCLUSION

For the reasons stated above, Respondents C.T. "Tommy" Myrick, Jeff Starnes and Carl Motley respectfully request that the Court deny the Petition for Writ of *Certiorari*.

Respectfully submitted,

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